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FEDERAL COMMUNICATIONS COMMISSION

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James H. Quello
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*Susan Ness
**Rachelle B. Chong

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*Commissioner Ness sworn in on June 3, 1994.
**Commissioner Chong sworn in on June 6, 1994.

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Federal Communications Commission Record

Volume 9
Issue 21

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemakings..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... viii

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 5711

Table of Cases
Volume 9
Issue 21

Case Name	Page
AT&T Communications	5763
Amendment of Part 25 - Mobile Satellite Service	5936
Amendment of Part 73 - Radio Broadcast Services	5772
American Telephone and Telegraph Company	5800
American Telephone and Telegraph Company (ERRATUM)	5767
Ameritech Operating Companies	5777
Ameritech's Petition for Waiver	5774
Broken Arrow Public School District #3	5783
Cable & Wireless, Inc.	5729
Cable TV Act of 1992 - Rate Regulation	5760
Cable TV Act of 1992 - Rate Regulation	5795
California State Petitions	5721
Cap Rock Telephone Company, Inc.	5717
Capitol Satellite and Communications Systems, Inc.	5804
Century Cable Management Corporation	5813
Century Norwich Corporation	5814
Comcast Cablevision of Tallahassee, Inc.	5748
Connecticut Department of Public Utility Control	5751
Contel Corporation	5775
Depreciation Rate Prescriptions	5820
Electric Plant Board of the City of Glasgow, Kentucky	5823
GTE Service Corporation	5794
GTE Telephone Operating Companies	5758
Highlands Broadcasting Co., Inc.	5746
IDB Worldcom Services, Inc.	5770
Intelenet Corporation	5745
Laurel Cablevision	5815
Lightning Broadcasting Company	5790
Louisiana Public Service Commission	5791
Matos, Aurio A.	5764
McCaw, Craig O.	5836
Military Communications Center, Inc.	5768
Moran Communications, Inc.	5788
Mountain Broadcasting Corporation	5787
National Association of Broadcasters	5778
Nationwide Wireless Network Corp. (ERRATUM)	5817
New York Metropolitan Area Public Safety Plan	5732
New York Metropolitan Area Public Safety Plan	5724
New York State Public Service Commission	5723
North Miami International Teleport	5741
Paragon Cable	5750
Rockton School District #140	5781
Southern California Public Safety Plan	5733
Southwestern Bell Telephone Company	5792
St. Thomas and San Juan Telephone Co.	5801
TKR Cable Company	5811
Table of Allotments, FM, Bamberg, SC	5816
Table of Allotments, FM, Belle Fourche, SD	5714
Table of Allotments, FM, Bulls Gap, TN	5734
Table of Allotments, FM, Cape Girardeau, MO	5715
Table of Allotments, FM, Cavalier, ND	5713
Table of Allotments, FM, Charlotte Harbor, FL	5725

Case Name	Page
Table of Allotments, FM, Ettrick, VA	5711
Table of Allotments, FM, Hermitage, MO	5752
Table of Allotments, FM, Jackson, LA	5756
Table of Allotments, FM, Jefferson City, TN	5738
Table of Allotments, FM, Mamou, LA	5728
Table of Allotments, FM, Muscatine, IA	5802
Table of Allotments, FM, Norris, TN	5736
Table of Allotments, FM, Ocean Isle Beach, NC	5754
Table of Allotments, FM, Pioche, NV	5757
Table of Allotments, FM, Southern Shores, NC	5755
Table of Allotments, FM, Tunica, MS	5803
Table of Allotments, FM, Woodville, MS	5718
WilTel International, Inc.	5806
Williams, James B.	5730
Wor-Wic Community College	5785

Table of Cases by Delegated Authority and FCC Number

Volume 9
Issue 21

Delegated Authority or FCC Number	Page
DA 94 - 856	5820
DA 94 - 974	5823
DA 94 -1008	5717
DA 94 -1039	5711
DA 94 -1040	5713
DA 94 -1041	5714
DA 94 -1042	5730
DA 94 -1047	5718
DA 94 -1050	5715
DA 94 -1052	5732
DA 94 -1053	5733
DA 94 -1054	5721
DA 94 -1055	5723
DA 94 -1057	5724
DA 94 -1058	5734
DA 94 -1059	5736
DA 94 -1060	5738
DA 94 -1061	5725
DA 94 -1062	5728
DA 94 -1064	5729
DA 94 -1065	5741
DA 94 -1066	5745
DA 94 -1067	5751
DA 94 -1069	5763
DA 94 -1070	5758
DA 94 -1071	5748
DA 94 -1072	5750
DA 94 -1074	5787
DA 94 -1075	5775
DA 94 -1076	5752
DA 94 -1077	5754
DA 94 -1078	5755
DA 94 -1079	5756
DA 94 -1080	5757
DA 94 -1081	5788
DA 94 -1082	5790
DA 94 -1084	5777
DA 94 -1085	5791
DA 94 -1088	5772
DA 94 -1089	5774
DA 94 -1090	5767
DA 94 -1091	5800
DA 94 -1092	5768
DA 94 -1093	5770
DA 94 -1094	5801
DA 94 -1095	5792
DA 94 -1096	5802
DA 94 -1097	5803
DA 94 -1098	5806
DA 94 -1108	5804
DA 94 -1109	5811
DA 94 -1110	5813
DA 94 -1111	5814
DA 94 -1112	5815
DA 94 -1114	5816
DA 94 -1181	5817
DA 94 -2000	5794
FCC 94 - 225	5778
FCC 94 - 226	5760
FCC 94 - 238	5836
FCC 94 - 241	5781
FCC 94 - 242	5783
FCC 94 - 243	5785
FCC 94 - 245	5746
FCC 94 - 254	5795
FCC 94 - 261	5936
FCC 94R - 16	5764

Table of Cases by Docket Number
Volume 9
Issue 21

Docket Number				Page
CC	Dkt.No.92	-	166	5936
GEN	Dkt.No.88	-	476	5724
MM	Dkt.No.90	-	48	5746
MM	Dkt.No.92	-	248	5755
MM	Dkt.No.92	-	266	5795
MM	Dkt.No.92	-	282	5725
MM	Dkt.No.93	-	89	5764
MM	Dkt.No.93	-	275	5757
MM	Dkt.No.93	-	321	5754
MM	Dkt.No.94	-	9	5803
MM	Dkt.No.94	-	16	5714
MM	Dkt.No.94	-	22	5756
MM	Dkt.No.94	-	25	5713
MM	Dkt.No.94	-	35	5802
MM	Dkt.No.94	-	40	5816
MM	Dkt.No.94	-	51	5728
MM	Dkt.No.94	-	113	5715
MM	Dkt.No.94	-	114	5711
MM	Dkt.No.94	-	115	5718
MM	Dkt.No.94	-	116	5738
MM	Dkt.No.94	-	117	5734
MM	Dkt.No.94	-	118	5736
MM	Dkt.No.94	-	119	5752
PR	Dkt.No.94	-	105	5721
PR	Dkt.No.94	-	106	5751
PR	Dkt.No.94	-	107	5791
PR	Dkt.No.94	-	108	5723

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 9
Issue 21

Rulemaking Number	Page
RM - 8080	5725
RM - 8104	5752
RM - 8105	5755
RM - 8185	5725
RM - 8373	5757
RM - 8409	5754
RM - 8423	5803
RM - 8432	5714
RM - 8438	5756
RM - 8441	5713
RM - 8442	5802
RM - 8456	5816
RM - 8466	5728
RM - 8507	5738
RM - 8508	5718
RM - 8514	5715
RM - 8515	5711
RM - 8520	5734
RM - 8521	5736

Table of Cases by City
Volume 9
Issue 21

City/ State	Page
Bamberg, SC	5816
Belle Fourche, SD	5714
Bozrah, CT	5814
Bulls Gap, TN	5734
Cape Girardeau, MO	5715
Carmel, CA	5746
Cavalier, ND	5713
Charlotte Harbor, FL	5725
City of Grapevine, TX	5750
Clayton, LA	5718
Culebra, PR	5764
Cumberland Gap, TN	5738
East Haddam, CT	5813
Elizabethton, TN	5738
Ettrick, VA	5711
Hermitage, MO	5752
Jackson, LA	5756
Jefferson City, TN	5738
Jena, LA	5718
Jonesville, LA	5728
Mamou, LA	5728
Marco, FL	5725
Muscatine, IA	5802
Norris, TN	5736
Ocean Isle Beach, NC	5754
Pioche, NV	5757
Punta Gorda, FL	5725
Rockford, IL	5781
Salisbury, MD	5785
Southern Shores, NC	5755
Tulsa, OK	5783
Tunica, MS	5803
Woodville, MS	5718

Subject	Page
Broadcast Radio Services - General Rules	
Applications for authorization	
Conditional grant of one of the mutually exclusive applications	5746
Conflicts in applications, agreement for removing	5764
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	5734, 5736, 5738, 5711, 5713, 5714, 5715, 5718, 5725, 5728, 5752, 5754, 5755, 5756, 5757, 5802, 5803, 5816
Cable Television Service	
Markets and services	
Cable signals in major markets, provisions for	5787, 5788, 5790
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	5745, 5741, 5768, 5770, 5800, 5801, 5804, 5806
Commission Organization	
Delegations of authority - Chief, Common Carrier Bureau	
Limitations on delegated authority	5758, 5763, 5777
Common Carriers/Affiliates: Reports	
Depreciation rates, reports of proposed changes in	5820
Communications Act of 1934	
Common Carriers	
Accounts, records, memoranda,forms of; depreciation charges	5820
Extension of lines, certificate for	5745, 5741, 5768, 5770, 5800, 5801, 5804, 5806
Radio, provisions relating to	
Sanctions, administrative	5778
Practice and Procedure	
Common carriers: complaints	
Formal or informal	5729
Information, general	
Rules, suspension, amendment, waiver	5717
Pleadings, briefs	
Pleadings and filing periods, provisions	5748, 5750, 5811, 5813, 5815
Reconsideration/review of Commission action	
Reconsideration of a final FCC action, petition for	5790
Special Broadcast Services	
Instructional TV fixed service	
Applications, selective procedures for mutually exclusive	5781, 5783

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.291 Delegated Authority	5758
000.291 Delegated Authority	5763
000.291 Delegated Authority	5777
000.291 Delegated Authority	5792
001.106 Petitions for reconsideration	5790
001.300 Petition for Waiver	5717
001.450(d) Request for Stay	5811
001.450(d) Request for stay	5813
001.450(d)Request for Stay	5748
001.450(d)Request for Stay	5750
001.450(d)Request for stay	5814
001.450(d)Request for stay	5815
001.711 Formal or informal complaints	5729
001.910 Revocation and/or cease and desist proceedings	5730
061.410(c) Price Cap Rules	5717
063.001 Contents of Application	5801
063.001 Contents of Applications	5741
063.001 Contents of Applications	5745
063.001 Contents of Applications	5768
063.001 Contents of Applications	5770
063.001 Contents of Applications	5804
063.001 Contents of Applications	5806
063.001 Contents of Applications DA 94-1091,10/7/94	5800
073.1944 Reasonable Access	5778
073.202 FM Table of Allotments	5713
073.202 FM Table of Allotments	5714
073.202 FM Table of Allotments	5715
073.202 FM Table of Allotments	5725
073.202 FM Table of Allotments	5728
073.202 FM Table of Allotments	5752
073.202 FM Table of Allotments	5754
073.202 FM Table of Allotments	5755
073.202 FM Table of Allotments	5756
073.202 FM Table of Allotments	5757
073.202 FM Table of Allotments	5802
073.202 FM Table of Allotments	5803
073.202 FM Table of Allotments	5816
073.3525 Settlement Agreements	5764
073.3592 Conditional grant	5746
074-932 Eligibility and Licensing requirements	5783
074.913 Selection Procedure for Mutual Exclusive ITFS Applica	5783
074.913 Selection Procedure For Mutually Exclusive ITFS Applica	5781
074.913 Selection Procedure for Mutually Exclusive ITFS Applica	5785
074.932 Eligibility and Licensing requirements	5781
074.932 Eligibility and Licensing requirements	5785
076.610 Disputes Concerning Carriage	5787
076.610 Disputes concerning carriage	5788
076.610 Disputes concerning carriage	5790
076.922 Rates for the basic service tier	5748
076.922 Rates for the basic service tier	5750

076.922 Rates for the basic service tier 5811
076.922 Rates for the basic service tier 5813
076.922 Rates for the basic service tier 5814
076.922 Rates for the basic service tier 5815
076.922 Rates for the basic service tier and cable programming 5795
076.922 Rates for the basic service tier and the cable programming services tier 5760
076.923 Rates for equipment and installation 5748
076.923 Rates for equipment and installation 5750
076.923 Rates for equipment and installation 5811
076.923 Rates for equipment and installation 5813
076.923 Rates for equipment and installation 5814
076.923 Rates for equipment and installation 5815
076.924 Cost accounting and cost allocation requirements 5795
076.933 Franchising authority review of basic cable rates 5795
300.214 Extension of Lines 5741
300.214 Extension of Lines 5745
300.214 Extension of Lines 5768
300.214 Extension of Lines 5770
300.214 Extension of Lines 5800
300.214 Extension of Lines 5801
300.214 Extension of Lines 5804
300.214 Extension of Lines 5806
300.312 Reasonable Access for Federal Candidates 5778
300.534 Carriage of Local Commercial Television Signals 5787
300.534 Carriage of local commercial television signals 5788
300.534 Carriage of local commercial television signals 5790
47 CFR 69, Access Charges 5774
47 CFR 69, Access Charges 5794
NPRM, FM B/C STAS. (Bulls Gap, TN), DA 94-1058 5734
NPRM, FM B/C STAS. (Jefferson City, Cumberland Gap and Elizabethton, TN), DA 94-1060 .. 5738
NPRM, FM B/C STAS. (Woodville, MS, Clayton and Jena, LA), DA 94-1047 5718
Part 36 Appendix-Glossary Study Area Definition 5717
Part 73 Radio Broadcast Services 5772

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-114

In the Matter of

Amendment of Section 73.202(b), RM-8515
Table of Allotments,
FM Broadcast Stations.
(Ettrick, Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 21, 1994; Released: October 3, 1994

Comment Date: November 25, 1994
Reply Comment Date: December 12, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Hoffman Communications, Inc. ("petitioner"), requesting the allotment of Channel 226A to Ettrick, Virginia, as the community's first local aural transmission service. Petitioner states that it will apply for the channel if allotted.

2. In support of its proposal, petitioner states that Ettrick is listed in the 1990 U.S. Census as a Census Designated Place ("CDP") with a population of 5,290 persons. In addition, petitioner notes that Ettrick contains numerous residential areas and businesses and is the home of Virginia State University.

3. Section 307(b) of the Communications Act of 1934, as amended, requires the Commission to allot channels "... among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. As a general rule, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status as a community for allotment purposes. Although Ettrick is listed as a CDP in the 1990 U.S. Census, this fact alone does not qualify Ettrick as a community for allotment purposes.[1] Therefore, petitioner should present the Commission with sufficient information to demonstrate that Ettrick has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes.[2]

4. We believe the public interest would be served by proposing the allotment of Channel 226A to Ettrick, if it is ultimately found to be a community for allotment purposes, since it provide a first local aural transmission service to the community. Channel 226A can be allotted to Ettrick in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.3 kilometers (7.6 miles) northwest in order to avoid a short-spacing conflict with Station WFOG(FM), Channel 225B, Suffolk, Virginia.[3]

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ettrick, Virginia	---	226A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **November 25, 1994**, and reply comments on or before **December 12, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David M. Silverman, Esq.
Cole, Raywid & Braverman
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
(Counsel for petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed

[1] According to the U.S. Bureau of Census, CDP's are delineated for the decennial census as the statistical counterparts of incorporated places. CDP's are comprised of densely settled concentrations of population that are identifiable by name, but are not legally incorporated places. Further, their boundaries, which usually coincide with viable features or the boundary of an adjacent incorporated place, have no legal status, nor do these places have officials elected to serve traditional municipal functions.

[2] *See e.g., Beaver Springs, Pennsylvania*, 4 FCC Rcd 5373 (1989), *Sargent, Nebraska*, 4 FCC Rcd 3933 (1989), *Bartow, Georgia, et al.*, 4 FCC Rcd 6876 (1989), *East Hemet, California, et al.*, 4 FCC Rcd 7895 (1989), and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

[3] The coordinates for Channel 226A at Ettrick are North Latitude 37-17-53 West Longitude 77-32-53.

Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-25

In the Matter of

Amendment of Section 73.202(b), RM-8441
Table of Allotments,
FM Broadcast Stations.
(Cavalier, North Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 21, 1994; Released: October 3, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Cavalier Radio ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 1539 (1994), proposing the allotment of Channel 286C2 to Cavalier, North Dakota, as the community's first local aural service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. The *Notice* pointed out that the petitioner had failed to comply with that portion of Section 1.52 of the Commission's Rules which requires petitioners not represented by legal counsel to include with their petition for rule making an affidavit verifying that the statements contained therein are true to the best of their knowledge. Although requested to correct this omission in comments herein, petitioner failed to do so. While the failure to provide the affidavit can constitute grounds for dismissal of the petition, we believe that in this instance such a severe penalty is not warranted. The request to allot a first local channel to Cavalier is unopposed and does not conflict with any other proposed allotment or application. Therefore, we believe that the proposal should be considered on its merits.

Technical Summary

3. We believe the public interest would be served by allotting Channel 286C2 to Cavalier since it could provide the community with its first local aural broadcast service. Channel 286C2 can be allotted to Cavalier in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence in the allotment has been received since Cavalier is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 17, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Cavalier, North Dakota	286C2

5. The window period for filing applications will open on **November 18, 1994**, and close on **December 19, 1994**.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 286C2 at Cavalier are 48-47-36 North Latitude and 97-37-12 West Longitude.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-16

In the Matter of

Amendment of Section 73.202(b), RM-8432
Table of Allotments,
FM Broadcast Stations.
(Belle Fourche, South Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 21, 1994; Released: October 3, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Ultimate Caps, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 1035 (1994), proposing the allotment of Channel 271C3 to Belle Fourche, South Dakota, as the community's second local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 271C3 to Belle Fourche, since it could provide the community with a first competitive FM service. Channel 271C3 can be allotted to Belle Fourche in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 17, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Belle Fourche, South Dakota	240C1, 271C3

4. The window period for filing applications will open on **November 18, 1994**, and close on **December 19, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 271C3 at Belle Fourche are 44-40-18 North Latitude and 103-51-00 West Longitude.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-113

In the Matter of

Amendment of Section 73.202(b), RM-8514
Table of Allotments,
FM Broadcast Stations.
(Cape Girardeau, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 23, 1994; Released: October 3, 1994

Comment Date: November 25, 1994
Reply Comment Date: December 12, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Kevin G. Greaser ("petitioner"), seeking the allotment of Channel 230A to Cape Girardeau, Missouri, as that community's third FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application for Channel 230A if the channel is allotted to Cape Girardeau.

2. We believe petitioner's proposal warrants consideration. Channel 230A can be allotted to Cape Girardeau, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. In view of the fact that the proposed allotment would provide a third local FM broadcast service to the community, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Cape Girardeau, Missouri	264C, 275C1	230A, 264C, 275C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 25, 1994**, and reply comments on or before **December 12, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Jeffrey D. Southmayd
Southmayd & Miller
1220 Nineteenth Street, N.W., Suite 400
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 230A at Cape Girardeau are 37-18-21 and 89-31-05.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Release Date: October 3, 1994

CAP ROCK TELEPHONE COMPANY, INC. AND GTE SOUTHWEST INCORPORATED FILED A JOINT PETITION FOR WAIVER OF THE DEFINITION OF "STUDY AREA" CONTAINED IN PART 36, APPENDIX-GLOSSARY, AND SECTION 61.41(C) OF THE COMMISSION'S RULES AAD 94-109

Comment Date: December 5, 1994
Reply Date: December 19, 1994

On August 8, 1994, Cap Rock Telephone Company, Inc. ("Cap Rock") and GTE Southwest Incorporated ("GTE") filed a joint petition for waiver of the definition of "Study Area" as set forth in Appendix-Glossary of Part 36 of the Commission's rules. This waiver would allow the petitioners to reflect the changes in their study area boundaries that would result from GTE's sale of four telephone exchanges in Texas to Cap Rock. Cap Rock also seeks waiver of Section 61.41(c) of the Commission's price cap rules, 47 C.F.R. § 61.41, to exempt it from the price cap "All or Nothing" rule and allow it to continue to operate as a cost company in the National Exchange Carrier Association's common line and traffic sensitive pools. The petitioners state that this transaction is pending before the Texas Public Service Commission.

Interested parties may file comments on GTE and Cap Rock's petition on or before **December 5, 1994**, and reply comments on or before **December 19, 1994**, with the Secretary, Federal Communications Commission, 1919 M Street, N.W., Room 222, Washington, D.C. 20554. Comments and reply comments should reference AAD 94-109. Four (4) copies should also be sent to Adrian Wright, Cost analysis Branch, Common Carrier Bureau, Room 812, 2000 L Street, N.W., Washington, D.C. 20554, and one (1) copy should be sent to the Commission's contractor for public service record duplication: International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition may be obtained from the Accounting and Audits Division's public reference room, Room 812, 2000 L Street, N.W., Washington, D.C. Copies are also available from ITS at (202) 857-3800.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1206. However, if this waiver petition is opposed, it will be treated as a restricted proceeding under the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1208-1.1218. For further information contact Adrian Wright at (202) 418-0830.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-115

In the Matter of

Amendment of Section 73.202(b), RM-8508
Table of Allotments,
FM Broadcast Stations.
(Woodville, Mississippi,
Clayton and Jena, Louisiana)

NOTICE OF PROPOSED RULE MAKING
AND
ORDER TO SHOW CAUSE

Adopted: September 22, 1994; Released: October 4, 1994

Comment Date: November 25, 1994
Reply Comment Date: December 12, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by PDB Broadcasting ("petitioner"), permittee of a new FM station, Channel 299A, Woodville, Mississippi, requesting the substitution of Channel 299C3 for Channel 299A at Woodville and modification of its construction permit to specify operation on the higher powered channel. To accommodate the substitution of Channel 299C3 at Woodville, petitioner also requests the substitution of Channel 274A for Channel 257A at Jena, Louisiana, and the modification of Station WJNA(FM)'s license to specify the change in channel; and the substitution of Channel 257A for vacant but applied for Channel 300A at Clayton, Louisiana.[1] Petitioner states it will apply for Channel 299C3 at Woodville and will also reimburse the licensee of Station WJNA(FM) for the reasonable expenses associated with the change in channel at Jena, Louisiana.[2]

2. We believe the public interest would be served by proposing the substitution of Channel 299C3 for Channel 299A at Woodville; the substitution of Channel 274A for Channel 257A at Jena; and the substitution of Channel 257A for Channel 300A at Clayton, since the proposal could provide Woodville with a wide coverage area FM service. Channel 299C3, Channel 274A, and Channel 257A can be allotted to Woodville, Jena and Clayton, respectively, in compliance with the Commission's minimum distance separation requirements. Channel 299C3 can be allotted Woodville with a site restriction of 21.9 kilometers (13.6 miles) northeast to accommodate petitioner's desired site.[3] Channel 274A can be allotted to Jena, Louisiana, at the transmitter site specified in Station WJNA(FM)'s license.[4] Also petitioner's proposal to upgrade its facilities at Woodville is fully spaced to Channel 257A, Clayton, Louisiana, at the reference coordinates, as well as the coordinates specified in Clayton FM's application. [5] Therefore, we direct an *Order to Show Cause* to the licensee of Station WJNA(FM) why its license should not be modified to specify operation on Channel 274A as proposed herein instead of the present Channel 257A.

3. As requested, we shall propose to modify the construction permit of petitioner's new FM station at Woodville, Mississippi, to specify operation on Channel 299C3. In accordance with Section 1.420(g) of the Commission's Rules we will not accept competing expressions of interest or require that the petitioner demonstrate the availability of an additional equivalent channel at Woodville, Mississippi.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Woodville, Mississippi	299A	299C3
Jena, Louisiana	257A	274A
Clayton, Louisiana	300A	257A

5. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Little River Radio Company, licensee of Station WJNA(FM), Jena, Louisiana, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 274A as proposed herein instead of the present Channel 257A.

6. Pursuant to Section 1.87 of the Commission's Rules, Little River Radio Company, may, not later than **November 25, 1994**, file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Little

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[1] According to Commission's records, Clayton FM Partnership ("Clayton FM") has filed an application for a construction permit (BPH-940113MD) for Channel 300A at Clayton, Louisiana. Therefore, we will serve a copy of this *Notice of Proposed Rule Making* on Clayton FM.

[2] Although the petitioner's request was signed, PDB Broadcasting failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.420(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919, n.41 (1990). The petitioner is requested to rectify this omission in his comments.

[3] The coordinates for Channel 299C3 at Woodville are North Latitude 31-13-43 and West Longitude 91-07-22.

[4] The coordinates for Channel 274A at Jena are North Latitude 31-41-51 and West Longitude 92-05-43.

[5] The reference coordinates for Channel 257A at Clayton are North Latitude 31-44-42 and West Longitude 91-32-54. The coordinates specified in Clayton FM's application are North Latitude 31-46-05 and West Longitude 91-34-39.

River Radio Company to furnish additional information. If Little River Radio Company raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Little River Radio Company will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station WJNA(FM), Little River Radio Company, P.O. Box 1319, Columbia, Louisiana 71418; and to the applicant for Channel 300A at Clayton: Clayton FM Partnership, 10496 Old Hammond Highway, Baton Rouge, Louisiana 70816.

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **November 25, 1994**, and reply comments on or before **December 12, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Donald B. Brady, President
PDB Corporation
204 Duncan
Jackson, Mississippi 39202
(Petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served o the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 94-105

In the Matter of

Petition of People of the State of California and the Public Utilities Commission of the State of California to Retain Regulatory Authority Over Intrastate Cellular Service Rates

ORDER EXTENDING TIME AND PERMITTING REPLIES TO REVISED PETITION

Adopted: September 26, 1994; Released: September 26, 1994

By the Chief, Private Radio Bureau:

1. Petitioners, People of the State of California and the Public Utilities Commission of the State of California (collectively California) have filed an emergency motion for a 45-day extension of time from the October 4, 1994 deadline for filing reply comments.[1] For the reasons given below, we grant California some, but not all, of the relief requested.

2. The amendments to the Communications Act in the Omnibus Budget Reconciliation Act of 1993 preempted state rate and entry regulation of commercial mobile radio services. A state could, however, obtain intrastate rate regulatory authority by filing a properly supported petition with the FCC.[2] States with existing rate regulation could petition by August 10, 1994 to continue regulating, and would obtain a stay of statutory preemption until the FCC acted. The Commission has one year in which to rule on the petition and to decide any reconsideration. California filed such a petition on August 9, 1994. Pursuant to the Commission's rules,[3] interested parties had 30 days in which to!: comment and then 15 days for replies.

3. Petitioners' motion is dated the date comments were due. They state that they had already received two lengthy pleadings and expected a substantial number of additional comments.[4] In fact, over 1,400 pages of comments and associated pleadings were filed on the California petition. By the time copies of the pleadings have been obtained, California states that it will have only six or seven business days in which to review and analyze the record, finalize its comments, and respond to a party's motion addressing confidentiality issues raised by the petition. Petitioners state that the issues involved are complex and that the proceeding concerns fundamental state interests. They claim that no party will be prejudiced, and the FCC's ability to meet the one-year statutory deadline not detrimentally affected, by the requested extension. They believe that the FCC will be well served by a complete record and careful analysis on the part of California. Petitioners allege that they have shown good cause for the requested extension.[5]

4. Although it does not object to "some appropriately brief" extension, Air Touch Communications, argues that the 45-day extension requested by California is excessive and needlessly delays resolution of this proceeding. It states that rate regulation costs California consumers $250 million per year, contrary to California's claim that no party will be prejudiced. It states that the pleading cycle in this proceeding was crafted to balance the rights of all parties, especially the public's right to be relieved of needless regulation.[6]

5. We agree with California that some measure of relief is required. The record in this proceeding is voluminous, and the issues, including the state of competition and reasonableness of cellular rates in the state, are intricate. Moreover, California filed revisions to its petition on September 13, 1994, which, at our request, included previously redacted information subsequently determined to be a matter of public record.[7] Interested parties may wish to comment on any new material. For these reasons, we conclude that an extension of time would serve the public interest. On the other hand, the Commission is faced with stringent statutory deadlines in a complex and massive proceeding. Granting an extension as long as California requests could impair the Commission's ability to comply with the statutory deadlines. As Air Touch suggests, these deadlines. For these reasons, we find that good cause has been shown for an extension of 15 days. This doubles the reply period permitted to a total of 30 days. We also put all parties on notice that those who wish to address the revised portions of California's petition should do so in these replies.

6. Pursuant to Section 1.46 of the Commission's Rules,[8] we GRANT IN PART AND DENY IN PART the Emergency Motion of the People of the State of California for a 45-Day Extension of Time to File Reply Comments TO THE EXTENT INDICATED HEREIN, and HERBY EXTEND the time for filing reply comments UNTIL October 19, 1994. Interested parties ARE PERMITTED to include any comments on the revised petition filed by California on September 13, 1994 in their reply comments.

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[1] Emergency Motion of the People of the State of California and the Public Utilities Commission of the State of California for a 45-Day Extension of Time To File Reply Comments (dated Sept. 19, 1994)(Motion).

[2] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (b)(2), 107 State. 312, 392 (1993), amending Section 332 (c)(3) of the Communications Act, 47 U.S.C. § 332 (c)(3).

[3] Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1522-23 (1994), 59 Fed. Reg. 18493 (Apr. 19, 1994) (to be codified at 47 C.F.R. § 20.13).

[4] Motion at 4.

[5] Motion at 3-4.

[6] Comments of AirTouch Communications on the CPUC's Emergency Motion at 1-2 (dated Sept. 23, 1994). AirTouch Communications (Airtouch) adds that California, by virtue of a 1994 investigation into the wireless industry, is well-prepared to respond to the comments in a timely fashion. *Id.* at 2.

[7] Ex Parte Letter from Ellen S. Levine, Principal Counsel, California Public Utilities Commission, to Hon. William F. Caton, Acting Secretary, FCC (dated Sept. 13, 1994).

[8] 47 C.F.R. § 1.46.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller, Chief
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 94-108

In the Matter of

Petition of the New York State Public Service Commission to Extend Rate Regulation

ORDER

Adopted: September 26 1994; Released: September 26, 1994

By the Chief, Private Radio Bureau:

1. Petitioner New York Public Service Commission (New York) has filed a motion for a 30-day extension of time from the October 4, 1994 deadline for filing reply comments.[1] For the reasons given below, we grant New York some, but not all, of the relief requested.

2. The amendments to the Communications Act in the Omnibus Budget Reconciliation Act of 1993 preempted state rate and entry regulation of commercial mobile radio services. A state could, however, obtain intrastate rate regulatory authority by filing a properly supported petition with the FCC.[2] States with existing rate regulation could petition by August 10, 1994 to continue regulating, and would obtain a stay of statutory preemption until the FCC acted. The Commission has one year in which to rule on the petition and to decide any reconsideration. New York filed such a petition on August 9, 1994. Pursuant to the Commission's rules,[3] interested parties had 30 days in which to comment and then 15 days for replies.

3. New York states that it needs the requested extension in order to have as much time to respond to the opposition as other parties were given to respond to its petition. It states that it needs the additional time in order to read and respond to the voluminous and complex comments filed. It observes that very few of the parties served New York with their pleadings and that it did not receive a full set until September 22. It states that an extension will not undermine the Commission's ability to complete the proceeding on a timely basis. New York claims that the complexity of the issues and the fundamental state interests at stake demonstrate that good cause exists for an extension.[4]

4. We agree with New York that some measure of relief is required. The record in this proceeding is large, and the issues, including the state of competition and reasonableness of cellular rates in the state, are intricate. For these reasons, we conclude that an extension of time would serve the public interest. On the other hand, the Commission is faced with stringent statutory deadlines in a large, complex proceeding. Granting an extension as long as New York requests could impair the Commission's ability to comply with the statutory deadlines. For these reasons, we find that good cause has been shown for an extension of 15 days. This doubles the reply period permitted to a total of 30 days.

5. Pursuant to Section 1.46 of the Commission's Rules,[5] we GRANT IN PART AND DENY IN PART the Motion of the New York Public Service Commission for Extension of Time in Which to File Comments TO THE EXTENT INDICATED HEREIN, AND HEREBY EXTEND the period for filing replies UNTIL October 19, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller, Chief
Private Radio Bureau

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[1] Motion for Extension of Time in Which To File Comments of New York State Public Service Commission (dated Sept. 23, 1994)(Motion).

[2] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (b)(2), 107 State. 312, 392 (1993), amending Section 332 (c)(3) of the Communications Act, 47 U.S.C. § 332 (c)(3).

[3] Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1522-23 (1994), 59 Fed. Reg. 18493 (Apr. 19, 1994) (to be codified at 47 C.F.R. § 20.13).

[4] Motion at 1-2.

[5] 47 C.F.R. § 1.46.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 88-476

In the Matter of

New York Metropolitan Area
Public Safety Plan

ORDER

Adopted: September 26, 1994; Released: October 4, 1994

By the Acting Chief, Land Mobile and Microwave Division and the Acting Chief, Spectrum Engineering Division:

1. The Private Radio Bureau and the Office of Engineering and Technology, acting under delegated authority, accepted the New York Metropolitan Area (Region 8) Public Safety Plan (Plan) on May 12, 1989, 4 FCC Rcd 4457 (1989).

2. By letter dated May 27, 1994, the Region proposed to amend its Plan. The proposed amendment would revise the current channel allotments. The Commission placed the letter on Public Notice for comments due on August 4, 1994, 9 FCC Rcd 3284 (1994), and received no comments.

3. We have reviewed the proposed amendment to the Region 8 Plan and, having received no comments to the contrary, conclude it furthers the interests of the eligible entities within the Region.

4. Accordingly, IT IS ORDERED, That the Public Safety Radio Plan for the New York Metropolitan Area (Region 8) IS AMENDED, as set forth in the Region's letter of May 27, 1994. This Amendment is effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Rosalind K. Allen
Acting Chief, Land Mobile
and Microwave Division

Lawrence P. Petak
Acting Chief, Spectrum Engineering
Division

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-282

In the Matter of

Amendment of Section 73.202(b),	RM-8080
Table of Allotments,	RM-8185
FM Broadcast Stations.	
(Charlotte Harbor, Marco,	
and Punta Gorda, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 27, 1994; Released: October 4, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 7849 (1992), issued in response to a petition for rule making filed by The University of South Florida ("Petitioner"), requesting the allotment of Channel 255A to Marco, Florida, and its reservation for noncommercial use. Petitioner filed comments restating its intention to apply for Channel 255A, if allotted. Ruth Communications Corporation ("Ruth"), permittee of Station WRWX(FM), Sanibel, Florida, filed comments. Intermart Broadcasting Southwest Florida, Inc., ("Intermart"), licensee of Station WIKX(FM),[2] Channel 225C2, Punta Gorda, Florida, and Naples Broadcasting Corporation ("Naples"), licensee of Station WGUF(FM), Channel 224A, Marco, Florida, filed joint comments and a counterproposal requesting the substitution of Channel 225C1 for Channel 225C2 at Punta Gorda, Florida, and the reallotment of Channel 225C1 from Punta Gorda, Florida, to Charlotte Harbor, Florida, as that community's first local transmission service. Naples and Intermart also requested the substitution Channel 255A for Channel 224A at Marco, Florida, and the allotment of Channel 219A to Marco, Florida, for use as a noncommercial educational channel.[3] Intermart and Naples filed reply comments. After the record closed Intermart filed a request for official notice.[4]

2. Ruth in its comments notes a pending *Notice of Proposed Rule Making*, 7 FCC Rcd 850 (1992) proposing to change the community of license for its Station WRWK(FM) from Sanibel to San Carlos Park, Florida. Ruth conceives that a site restriction may be necessary for Channel 255A at Marco in order to accommodate both the San Carlos Park and Marco proposals. Ruth also asks that the Commission should take no action in the Marco proceeding which would prejudice action in the San Carlos Park proceeding.

3. Intermart and Naples in their counterproposal request the substitution of Channel 225C1 for Channel 225C2 at Punta Gorda, Florida, and the reallotment of Channel 225C1 from Punta Gorda, Florida, to Charlotte Harbor, Florida, as that community's first local transmission service. In order to accommodate this upgrade and change of community of license, the substitution of Channel 255A for Channel 224A at Marco, Florida, is required.[5] Intermart and Naples submit that Channel 219A is available for use at Marco as a noncommercial educational channel, therefore the Commission does not need to make an exception to its general policy of assigning noncommercial educational licensees to the reservedportion of the FM band.[6] Intermart also state that the allotment of Channel 225C1 to Charlotte Harbor is mutually exclusive with Channel 225C2 at Punta Gorda. Punta Gorda will continue to receive local service from Station WCCF(AM).

4. Intermart and Naples claims that their proposals will better serve the public interest since the reallotment of Channel 225C1 from Punta Gorda (population 10,747) to Charlotte Harbor (population 3,327)[7] will provide first local service to Charlotte Harbor a community immediately adjacent to Punta Gorda, and permit the expansion of service by Station WIKX(FM) to provide 1.0 mV/m service to 813,763 persons, which is an increase of 344,672 persons over its presently licensed Class C2 facility. In addition, Station WGUF(FM), Marco, Florida will be able to expand its service to 6 kilowatts on Channel 255A. Intermart states that Charlotte Harbor is a census designated place ("CDP") located in Charlotte County, Florida, with a 1990 population of 3,327 persons. Intermart notes that Charlotte Harbor has two retail shopping centers, Harbor Square and School House Square, and together these centers have 65 retail businesses. The Punta Gorda/Port Charlotte Telephone Directory, in which listings for Charlotte Harbor are included, lists the following businesses and organizations:

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[1] The communities of Charlotte Harbor and Punta Gorda, Florida, have been added to the caption.

[2] The station formerly had the call sign WQLM(FM).

[3] Public Notice of the counterproposal was given on February 17, 1993, Report No. 1927 (RM-8185).

[4] The Commission's Rules do not contemplate the filing of pleadings beyond the comment and reply comment periods unless specifically requested. However, in this instance we believe that acceptance is in the public interest, since it puts us on notice that the petitioner has filed an application for FM educational channel 219A at Marco, Florida (File No. BPED-930701MB).

[5] In the joint counterproposal filed by Naples and Intermart, Naples has consented to a hypothetical relocation of its transmitter site in order to substitute Channel 255A for Channel 224A at Marco at coordinates 25-59-57 and 81-38-38. However, Naples would like to use its current transmitter site (26-01-50 and 81-38-33) for Channel 255A at Marco, Florida, utilizing §73.215. Naples states that if it cannot utilize §73.215 at its current transmitter site, it will file an application at the hypothetical site and relocate its transmitter in order to operate on Channel 255A as a 6 kilowatt station.

[6] The availability of Channel 219A at Marco is based on the return of an application for a new noncommercial station on Channel 219A at Naples, Florida. New Hope Ministry, Inc., filed an application in May, 1991 (File No. BPED-910523MG). That application was returned July 28, 1992, because of technical discrepancies, and the applicant did not file a petition for reconsideration. Therefore, Channel 219A is available for allotment to Marco, Florida.

[7] All population figures are taken from the 1990 U.S. Census, unless stated otherwise.

Charlotte Harbor Auto Sales, Charlotte Harbor Cabinets, Charlotte Harbor Environmental Center, Inc., Charlotte Harbor Exhaust, Charlotte Harbor Imports, Charlotte Harbor RV Park, Charlotte Harbor Seaplane Base, Charlotte Harbor Shell. Charlotte Harbor also has its own elementary school, water association, two churches and a yacht club.

5. Intermart and Naples filed reply comments and submitted a technical statement which shows that there is no need to impose any additional site restriction on the proposed Marco allotment, because the proposed reference site for Channel 255A at Marco meets the spacing requirements to Ruth's proposal.

6. Based on the above information, we believe the public interest would be served by reallotting Channel 225C1 from Punta Gorda, Florida to Charlotte Harbor, Florida, as that community's first local transmission service. In order to accommodate the upgrade and change in community of license at Charlotte Harbor, we will also substitute Channel 255A for Channel 224A at Marco, Florida.[8] Intermart has demonstrated that the reallotment would result in a preferential arrangement of allotments. Charlotte Harbor, a CDP with a 1990 population of 3,327 persons, has no other services licensed to it. Punta Gorda (population 10,747) will continue to receive local aural transmission service from Station WCCF(AM). We also note that Charlotte Harbor and Punta Gorda are both located within the Punta Gorda urbanized area, as defined by the 1990 U.S. Census. *See Los Angeles and Norwalk, California,* 6 FCC Rcd 5317 (1991).[9] In addition, our analysis shows that upgrading Station WIKX(FM) to Channel 225C1, which could occur regardless of whether the station changes its community of license. However, the reallotment of Channel 225C1 from Punta Gorda to Charlotte Harbor would provide service to an additional 252,717 persons within a 1,936 square kilometer area (747 square miles), and 76 persons will lose reception service within a 19.8 square kilometer area (7.6 square miles). The analysis also shows that the loss area for Punta Gorda and the gain area both receive at least five reception services. Under these circumstances the loss of reception service in an extremely small, extremely sparsely populated, and generally adequately served area, is warranted in order to provide reception service to a significantly greater number of people and a larger area.

TECHNICAL SUMMARY

7. Channel 225C1 can be allotted to Charlotte Harbor in compliance with the Commission's minimum distance separation requirements, with a site restriction of 21.5 kilometers (13.4 miles) southwest of the community.[10] Channel 255A can be allotted to Marco in compliance with the Commission's minimum distance separation requirements, with a site restriction of 14 kilometers (8.7 miles) northeast of the community.[11] In accordance with Section 1.420(i) of the Commission's Rules, we will modify the license for Station WIKX(FM) to specify Channel 225C1, Charlotte Harbor, Florida, as its community of license. We will also modify the license for Station WGUF(FM) to specify Channel 255A at Marco, Florida.

8. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 18, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Charlotte Harbor, Florida	225C1
Marco, Florida	255A, 266C1
Punta Gorda, Florida	--

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Intermart Broadcasting Southwest Florida, Inc., licensee of Station WIKX(FM), Channel 225C2, Punta Gorda, Florida, IS MODIFIED, to specify operation on Channel 225C1, Charlotte Harbor, Florida, in lieu Channel 225C2, Punta Gorda, Florida, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Naples Broadcasting Corporation for Station WGUF(FM), Channel 224A, Marco, Florida, IS MODIFIED, to specify operation on Channel 255A in lieu of Channel 224A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the station authorization except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules require prior authorization pursuant to an application for construction permit (FCC Form 301).

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[8] We will not reserve Channel *255A for noncommercial educational use. An engineering analysis has confirmed that reserved noncommercial Channel 219A is available for use at Marco, Florida. Petitioner presently has an application on file for Channel 219A at Marco, Florida (File No. BPED-930701MB).

[9] FM transmission services from the Punta Gorda urbanized area are: WIKX(FM), Channel 225C2, Punta Gorda, Florida, WVIJ(FM), Channel 219A, Port Charlotte, Florida, WEEJ(FM), Channel 261C1, Port Charlotte, Florida, and WMMY(FM), Channel 285A, Solana, Florida. WCCF is the only (AM) transmission service from the Punta Gorda urbanized area.

[10] The coordinates for Channel 225C1 at Charlotte Harbor are North Latitude 26-52-25 and West Longitude 82-15-43.

[11] The coordinates for Channel 255A at Marco are North Latitude 25-59-57 and West Longitude 81-38-38.

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with the station authorization except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

11. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Intermart Broadcasting Southwest Florida, Inc., licensee of Station WIKX(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the change of community of license and upgrade.

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-51

In the Matter of

Amendment of Section 73.202(b), RM-8466
Table of Allotments,
FM Broadcast Stations.
(Mamou and Jonesville,
Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 27, 1994; Released: October 4, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Simla B. Ellis d/b/a SoTo Broadcasting ("petitioner"), permittee for a new FM station, Channel 266A, at Mamou, Louisiana, the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 2764 (1994), proposing the substitution of Channel 266C3 for Channel 266A at Mamou and modification of petitioner's authorization to specify operation on the higher powered channel. In order to accommodate the upgrade at Mamou, petitioner's also requested the substitution of Channel 286A for vacant Channel 266A at Jonesville, Louisiana.

2. Petitioner failed to file comments stating it intention to apply for Channel 266C3 if allotted to Mamou, Louisiana. As stated in the *Notice*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's policy to refrain from making an allotment to a community absent an expression of interest. Therefore, we shall dismiss petitioner's proposal to substitute Channel 266C3 for Channel 266A at Mamou, Louisiana. *See, e.g., Joshua Tree, California*, 54 FR 18557, May 1, 1989, *Senatobia, Mississippi*, 3 FCC Rcd 4000 (1988), and paragraph 2 of the Appendix of the *Notice*.

3. Accordingly, IT IS ORDERED That the petition for rule making filed by Simla B. Ellis d/b/a SoTo Broadcasting, IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS, INC.,
LDDS COMMUNICATIONS, INC. d/b/a
LDDSMETROMEDIA COMMUNICATIONS,
ONE TO ONE COMMUNICATIONS, INC.,
PACNET, INC.
TELECONCEPTS, INC., d/b/a
TELEPHONE EXPRESS,
Complainants,

v.

U S WEST COMMUNICATIONS, INC.,
Defendant.

File No. E-93-123

ORDER

Adopted: September 27, 1994; Released: October 4, 1994

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 27, 1993, Cable & Wireless, Inc. (Cable & Wireless), along with several other complainants, filed the above-captioned complaint against the U S WEST Communications, Inc. (U S WEST) seeking damages resulting from U S WEST's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On June 1, 1994, however, Cable & Wireless and U S WEST filed a joint motion requesting that Cable & Wireless be dismissed from the complaint with prejudice. In support of the motion, the parties state that a mutually agreeable settlement has been reached.

2. We are satisfied that granting the parties' joint motion for partial dismissal will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the parties and by the Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the parties' Joint Motion for Partial Dismissal IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE to the extent that it relates to the claims and requests for relief of Cable & Wireless, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints and
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the
Revocation of license of

JAMES B. WILLIAMS
Wilmington, California
Amateur Radio Station AA6TC

and

Suspension of license of

JAMES B. WILLIAMS
Wilmington, California
Amateur Extra Class
Radio Operator License

and

Revocation of license of

ROSE MARIE FLORES
Santa Monica, California
Amateur Radio Station N6WPR

and

Suspension of license of

ROSE MARIE FLORES
Santa Monica, California
Amateur Extra Class
Radio Operator License

and

Revocation of license of

ROBERT L. FLORES
Santa Monica, California
Amateur Radio Station N6WPQ

and

Suspension of license of

ROBERT L. FLORES
Santa Monica, California
Amateur Extra Class
Radio Operator License

ORDER TO SHOW CAUSE AND SUSPENSION ORDER

Adopted: September 20, 1994; Released: September 27, 1994

1. The Commission has before it for consideration the amateur radio station licenses and Amateur Extra Class operator licenses held by James B. Williams (AA6TC), Rose Marie Flores (N6WPR), and Robert L. Flores (N6WPQ).

2. It appears that the respondents -- James B. Williams, Rose Marie Flores, and Robert L. Flores -- and a fourth person were volunteer examiners (VEs) at an amateur operator license examination session held at the Carol Little Company (Company) in Los Angeles, California, on August 15, 1993. It is undisputed that they administered examinations at that session to seven members of a class that had been held for Company employees. The respondent VEs claim that they also examined numerous additional persons at the same session. Information available to the Commission, however, indicates that the respondents did not examine additional persons.

3. It appears further that the respondents willfully signed VE certifications and Certificates of Successful Completion of Examination indicating that persons who were not examined at the Company session had passed the examination elements required for amateur operator licenses at that session. It also appears that respondent Rose Marie Flores, who was in charge of the paperwork at the Company session, willfully obtained the signatures of other VEs upon certifications and Certificates of Successful Completion of Examination indicating that persons who were not examined at that session had passed the examination elements required for amateur operator licenses. It appears, therefore, that the respondents assisted other persons to obtain amateur operator licenses by fraudulent means, in willful and repeated violation of Sections 97.17(e) and 97.517 of the Commission's Rules, 47 C.F.R. §§ 97.17(e) and 97.517;[1] and that the respondents made misrepresentations of material fact to the Commission.

4. It appears further that the respondents claimed, in their replies of June 5 (Williams), June 25 (Robert L. Flores -- date of postmark) and July 14 (Rose Marie Flores) to Commission correspondence, that there was a second examination sitting on August 15, 1993, on the premisses of the Company. Information available to the Commission, however, indicates that there was no "second sitting." It appears, therefore, that the respondents' claims are misrepresentations of material fact to the Commission.

[1] Section 97.17(e) provides: "No person shall obtain or attempt to obtain or assist another person to obtain or attempt to obtain an amateur operator license or reciprocal permit for alien amateur operator license by fraudulent means." Section 97.517 provides: "No VE may administer or certify any examination by fraudulent means or for monetary or other consideration including reimbursement in any amount in excess of that permitted. Violation of this provision may result in revocation of the VE's amateur station license and the suspension of the VE's amateur operator license."

5. IT IS ORDERED that, under Sections 312(a)(2) and (4) and 312(c) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. §§ 312 (a)(2) and (4) and 312(c), the respondents ARE DIRECTED TO SHOW CAUSE why the captioned radio station licenses should not be REVOKED; that the respondents' captioned operator licenses ARE SUSPENDED, under Sections 303(m)(1)(A) and (F) of the Act, 47 U.S.C. § 303(m)(1)(A) and (F), for the remainder of their terms; and that the issues thereupon will be the following:

(a) To determine whether the respondents willfully and/or repeatedly violated Sections 97.17(e) and 97.517 of the Commission's Rules, 47 C.F.R. §§ 97.17(e) and 97.517.

(b) To determine whether the respondents misrepresented material facts to the Commission.

(c) To determine whether the respondents are qualified to remain Commission licensees.

(d) To determine whether the Commission would be warranted in refusing to grant an amateur service license to each respondent on the basis of an original application.

(e) To determine whether each of the captioned radio station licenses should be revoked.

(f) To determine whether the suspension of each of the captioned operator licenses should be affirmed, modified or dismissed.

6. IT IS FURTHER ORDERED that, to avail him or herself of the right, under Section 1.91(c) of the Commission's Rules, 47 C.F.R. § 1.91(c), to present evidence at a hearing, each respondent desiring a hearing shall file a request for a hearing within 30 days after receiving this order. If a hearing is requested, a time, place and presiding Administrative Law Judge will be designated by subsequent order. If any or all respondents do not request a hearing, the Commission will consider a written statement from each respondent not requesting a hearing and will determine, without a hearing, whether revocation and/or suspension is warranted.

7. IT IS FURTHER ORDERED that the operator license suspension of any respondent who files a timely request for a hearing or a written statement will be held in abeyance pending a decision and that the operator license suspension of any respondent who does *not* file a timely request for a hearing or a written statement will take effect 30 days after his or her receipt of this order.

8. IT IS FURTHER ORDERED that the captioned proceedings are CONSOLIDATED pursuant to Section 1.227 of the Commission's Rules, 47 C.F.R. § 1.227. The captioned proceedings involve substantially the same issues and their consolidation will best conduce to the proper dispatch of business and to the ends of justice.

9. IT IS FURTHER ORDERED that, under Section 312(d) of the Act, 47 USC § 312(d), both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Private Radio Bureau as to all issues.

10. IT IS FURTHER ORDERED that copies of this Order shall be sent to each respondent by Certified Mail -- Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 27, 1994

COMMENTS INVITED ON NEW YORK METROPOLITAN AREA PUBLIC SAFETY PLAN AMENDMENT

On May 12, 1989, the Commission accepted the Public Safety Plan for the New York Metropolitan area (Region 8). On July 11, 1994, Region 8 submitted proposed amendments to its plan that would revise the current channel allotments. Because the proposed amendment is a major change to the Region 8 plan, the Commission is soliciting comments from the public before taking action. (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 57.)

Interested parties may file comments to the proposed amendments on or before **November 4, 1994** and reply comments on or before **November 21, 1994**. Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **General Docket 88-476 New York Metropolitan Area-Public Safety Region 8**.

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 27, 1994

COMMENTS INVITED ON SOUTHERN CALIFORNIA PUBLIC SAFETY PLAN AMENDMENT

On November 8, 1989, the Commission accepted the Public Safety Plan for Southern California (Region 5). On August 1, 1994, Region 5 submitted a proposed amendment to its plan that would revise the current channel allotments. Because the proposed amendment is a major change to the Region 5 plan, the Commission is soliciting comments from the public before taking action. (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 57.)

Interested parties may file comments to the proposed amendment on or before **November 4, 1994** and reply comments on or before **November 21, 1994**. Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **Gen. Docket 89-97 Southern California-Public Safety Region 5**.

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-117

In the Matter of

Amendment of Section 73.202(b), RM-8520
Table of Allotments,
FM Broadcast Stations.
(Bulls Gap, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1994; Released: October 5, 1994

Comment Date: November 28, 1994
Reply Comment Date: December 13, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Bulls Gap Broadcasting ("petitioner"), requesting the allotment of Channel 264A to Bulls Gap, Tennessee, as the community's first local aural transmission service. Petitioner filed a supplement to its petition which indicated its intention to apply for Channel 264A at Bulls Gap, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 264A to Bulls Gap[1] since it could provide the community with its first local FM service. Channel 264A can be allotted to Bulls Gap in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.2 kilometers (1.4 miles) west in order to avoid a short-spacing conflict with the licensed operation of Station WZJS(FM), Channel 264A, Banner Elk, North Carolina.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Bulls Gap, Tennessee	–	264A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 28, 1994**, and reply comments on or before **December 13, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dan J. Alpert, Esq.
1250 Connecticut Avenue, N.W.
#700
Washington, D.C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] According to the 1990 U.S. Census, Bulls Gap is an incorporated community with a population of 659 persons.

[2] The coordinates for Channel 264A at Bulls Gap are North Latitude 36-15-23 and West Longitude 83-06-34.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-118

In the Matter of

Amendment of Section 73.202(b), RM-8521
Table of Allotments,
FM Broadcast Stations.
(Norris, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 26, 1994; Released: October 5, 1994

Comment Date: November 28, 1994
Reply Comment Date: December 13, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Norris Broadcasting Company ("petitioner"), requesting the allotment of Channel 294A to Norris, Tennessee, as the community's first local aural transmission service. Petitioner states it will apply for Channel 294A, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 294A to Norris[1] since it could provide the community with its first local FM service. Channel 294A can be allotted to Norris in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.1 kilometers (2.5 miles) northeast in order to avoid a short-spacing conflict with Station WSKZ(FM), Channel 293C, Chattanooga, Tennessee.[2]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Norris, Tennessee	--	294A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 28, 1994**, and reply comments on or before **December 13, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Neal J. Friedman, Esq.
Pepper & Corazzini
Suite 200
1776 K Street, N.W.
Washington, D.C. 20006
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] According to the 1990 U.S. Census, Norris is an incorporated community with a population of 1,303 persons.

[2] The coordinates for Channel 294A at Norris are North Latitude 36-13-47 and West Longitude 84-02-59.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-116

In the Matter of

Amendment of Section 73.202(b), RM-8507
Table of Allotments,
FM Broadcast Stations.
(Jefferson City, Cumberland Gap
Elizabethton, Tennessee)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 27, 1994; Released: October 5, 1994

Comment Date: November 28, 1994
Reply Comment Date: December 13, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Eaton P. Govan, III and Berton B. Cagle, Jr. (petitioners), licensees of both Station WUSK-FM, Channel 257A, Jefferson City, Tennessee, and Station WUSJ-FM, Channel 257C3, Elizabethton, Tennessee, proposing the substitution of Channel 256A for Channel 257A at Jefferson City, the reallotment of Channel 256A from Jefferson City to Cumberland Gap, Tennessee, and modification of petitioners' authorization to specify Cumberland Gap as Station WUSK-FM's community of license. In addition, petitioners request the substitution of Channel 257C2 for Channel 257C3 at Elizabethton, Tennessee, and modification of Station WUSJ-FM's license to specify operation on the higher powered channel. Petitioners state they will apply for Channel 256A at Cumberland Gap and Channel 257C2 at Elizabethton, Tennessee.[3]

2. Petitioners seek to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permit the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.[4] In support of their proposal, petitioners state that the reallotment of Channel 256A to Cumberland Gap will move the station away from the Knoxville urbanized area, thereby giving the station an opportunity for financial stability without the intense competition from the "big city" stations. Petitioners claim that adoption of their proposal would be in the public interest since it will not deprive Jefferson City of its only local radio station,[5] and will provide Cumberland Gap with its first local aural transmission service. Petitioners note that Cumberland Gap is situated along the Tennessee state line thus the proposed facility would also serve a substantial portion of Bell County, Kentucky, and Lee County, Virginia, which includes a sizable population. In addition, they contend that the reallotment of Channel 256A to Cumberland Gap will allow Station WUSJ-FM at Elizabethton to upgrade its facilities from Class C3 to Class C2, thereby increasing its coverage area from 4,570 to 8,033 square kilometers.

3. Based upon the showing submitted by petitioners, we are not convinced that Cumberland Gap is a "community" for allotment purposes. The Commission's long standing policy is to allot channels to communities composed of identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. In this case, we find that Cumberland Gap is not listed in the U.S. Census or incorporated. Moreover, petitioners merely comment that Cumberland Gap has a 1990 U.S. Census population of 210 persons and is located in Clairborne County which has a population of 21,137 persons. We do note that Cumberland Gap is listed in the 1994 edition of the *Rand McNally Commercial Atlas*, however, this factor standing alone is not sufficient to warrant a determination that Cumberland Gap is a *bona fide* community for allotment purposes. *See Oak Beach and Bay Shore, New York*, 57 RR 2d 1275 (1985). Therefore, we believe that additional demographic data is required to assist us in determining whether Cumberland Gap is a community for allotment purposes. Petitioners are requested to submit information regarding Cumberland Gap to demonstrate whether it has any commercial establishments, social, economic, cultural or religious organizations, municipal services, or government entities that identify themselves specifically with Cumberland Gap.

4. We believe the proposal warrants further consideration, should Cumberland Gap ultimately be deemed a community for allotment purposes. However, since petitioners propose to relocate Station WUSK-FM's transmitter site, we request that petitioners provide information showing the areas and populations which will receive new service and the areas and populations which will lose existing service if Channel 256A is allotted to Cumberland Gap. The study should also indicate the number of reception services which are now available within the gains and loss areas.

5. Channel 256A can be allotted to Cumberland Gap in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.7 kilometers (8.5 miles) east to accommodate petitioners'

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[3] Although petitioners' request indicate that the original copy of their proposal was signed, petitioners failed to include an affidavit verifying that the statements contained in their petition were accurate to the best of their knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.40(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and certification. *See also Amendment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, n.42 (1990). Petitioners are requested to rectify this omission in their comments.

[4] *See Modification of FM License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part ("Change of Community MO&O")*, 5 FCC Rcd 7094 (1990).

[5] Jefferson City is also served by Station WJFC(AM).

desired site.[6] As requested, we also propose to modify petitioners' license for Station WUSK-FM at Jefferson City to specify Cumberland Gap as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 256A at Cumberland Gap or require the petitioners to demonstrate the availability of an additional equivalent class channel for use by such parties. In addition, this proposal is contingent upon Station WTFM(FM) at Kingsport, Tennessee, receiving a license to operate at the site specified in its application for construction permit (BPH-930121ID). Therefore, we may not finalize this proceeding until the Kingsport station is licensed accordingly.

6. We will also propose the substitution of Channel 257C2 for Channel 257C3 at Elizabethton, since it could provide the community with a wide coverage area FM service. Channel 257C2 can be allotted to Elizabethton with the Commission's minimum distance separation requirements with a site restriction of 2.2 kilometers (1.3 miles) west to accommodate petitioners' desired site.[7] As requested, we also propose to modify petitioners' license for Station WUSJ-FM to specify operation on Channel 257C2. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 257C2 at Elizabethton or require the petitioners to demonstrate the availability of an additional equivalent class channel for use by such parties.

7. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Jefferson City, Tennessee	257A	---
Cumberland Gap, Tennessee	---	256A
Elizabethton, Tennessee	257C3	257C2

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **November 28, 1994**, and reply comments on or before **December 13, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Eaton P. Govan, III, and Berton B. Cagle, Jr.
P.O. Box 5188
Johnson City, Tennessee 37603
(Petitioners)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

[6] The coordinates for Channel 256A at Cumberland Gap are North Latitude 36-36-56 and West Longitude 83-31-00.

[7] The coordinates for Channel 257C2 at Elizabethton are North Latitude 36-20-30 and West Longitude 82-14-00.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TLC PRODUCTIONS, INC. d/b/a
NORTH MIAMI INTERNATIONAL
TELEPORT

Application for authority to acquire and operate facilities via the Pan American Satellite (PAS) system for service between the U.S. and various international points for provision of voice, data and video services.

File No. I-T-C-94-318

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 22, 1994; Released: October 5, 1994

By the Chief, International Facilities Division.

1. Upon consideration of the above-captioned uncontested application requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communications between the U.S. and various international points via the Pan American Satellite (PAS) system for the provision of international voice, data and video services, IT IS HEREBY CERTIFIED that the public convenience and necessity will be served by its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-318 IS GRANTED and TLC Productions, Inc. d/b/a Miami International Teleport (TLC) is authorized to:

a. lease from PAS and operate the satellite circuits specified in Attachment A (parts a and b, respectively) between appropriately licensed earth stations in the U.S. and the PAS-1 satellite, connecting with similar circuits between the satellite and earth stations in the countries listed in Attachment A, furnished by TLC's correspondents;

b. lease from PAS and operate four T-1 satellite circuits between appropriately licensed U.S. earth stations and the PAS-1 satellite, connecting with similar circuits between the satellite and an earth station in Panama furnished by TLC's correspondent;

c. lease and operate facilities in the U.S. earth stations authorized to communicate with the PAS-1 satellite;

d. lease and operate necessary domestic connecting facilities;

e. use the facilities in a, c, and d, above, to provide private line services not interconnected with the public switched networks (10 64-kbps circuits to each location) and switched services interconnected with the public switched networks (6 64-kbps circuits to each location) between the U.S. and the countries listed in Attachment A (Parts a and b, respectively) subject to any restrictions set forth in this or any other Commission order involving separate international satellite systems; and

f. use the facilities in b, c, and d, above, to provide switched services interconnected with the public switched networks between the United States and Panama.

3. IT IS FURTHER ORDERED that neither TLC nor any persons or companies directly or indirectly controlling or controlled by TLC, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which TLC or any persons or companies controlling or controlled by TLC are parties.

4. IT IS FURTHER ORDERED that our authorization of TLC to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and the countries listed in Attachment A -- that is, private lines which originate in the United States and terminate in one of the countries listed in Attachment A or which originate in one of the countries listed in Attachment A and terminate in the United States. In addition, TLC may not -- and TLC's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or the foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the countries listed in Attachment A afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1994), *petition for reconsideration pending*.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreements entered into with its foreign correspondents with the Commission within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203 and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for any additional circuits it seeks to operate via the PAS-1 satellite.

9. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to limitations on the

number of circuits specified under the separate systems policy and applicable consultations under Article XIV(d) of the INTELSAT Agreement.

10. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT A

(a) Applicant is authorzed to establish up to ten (10) 64-Kbps voice-grade circuits between the U.S. and the countries listed below for communications NOT INTERCONNECTED with the public switched network:

Ku band countries	C band countries
Anguilla	Anguilla
Austria	Argentina
Azerbaijan	Aruba
Bahamas	Bahamas
Belgium	Barbados
Bermuda	Bermuda
Bosnia-Herzogovenia	Bolivia
British Virgin Is.	Brazil
Cayman Islands	British Virgin Is.
Czech Republic	Cayman Islands
Denmark	Chile
France	Colombia
Germany	Costa Rica
Greece	Dominican Rep.
Ireland	Ecuador
Italy	Guatemala
Luxembourg	Haiti
Monaco	Honduras
Montserrat	Jamaica
Netherlands	Mexico
Portugal	Montserrat
Romania	Netherlands Antilles
Russian Federation	Panama
Somalia	Paraguay
Spain	Peru
Sweden	Trinidad & Tobago
Switzerland	Turks & Caicos
Turks & Caicos	Uruguay
United Kingdom	Venezuela
Yugoslavia	

(b) Applicant is authorizrf to establish up to six (6) 64-kbps voice-grade circuits between the U.S. and the countries listed below for communications INTERCONNECTED with the public switched network:

Ku band countries

Azerbaijan
Bahamas
Bosnia-Herzogovenia
Czech Republic
Portugal
Romania
Russian Federation
Somalia
United Kingdom

C band countries

Bahamas
Bolivia
Costa Rica
Dominican Republic
Netherlands Antilles
Peru

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTELENET, INC. d/b/a INTELENET CORPORATION — File No. I-T-C-93-329

Application for authority to operate as an international resale carrier.

ORDER AND AUTHORIZATION

Adopted: September 27, 1994; Released: October 5, 1994

By the Chief, International Facilities Division:

1. The above-captioned application, filed August 26, 1993 by Intelenet, Inc. d/b/a Intelenet Corporation (Intelenet), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the international switched voice services of other common carriers for the provision of international switched communications services between the U.S. and various overseas points. The application was placed on public notice on September 29, 1993. A Petition to Deny the application was filed on October 29, 1993 by MFS Intelenet, Inc. (MFS). Intelenet filed an Opposition to the Petition to Deny, and several other pleadings were filed, the most recent of which were filed in April, 1994, by both parties.

2. In its Petition fo Deny, MFS states that Intelenet's name is so similar to its name, MFS Intelenet, that it could cause confusion among potential customers. Both companies operate in the same marketplace, and potential customers come from the same base. Intelenet argues that the two names, i.e. Intelenet, Inc. and MFS Intelenet are not similar enough to confuse the public.

3. We do not believe that the FCC is the appropriate forum for the resolution of potential trade name or copyright problems. Therefore, since the parties have not succeeded in resolving the dispute, we will grant the application, subject to any future decision which might be made by the parties, a court, or any other entity with jurisdiction over such issues. At such time as a decision is taken on this issue and filed with the Commission, appropriate action will be taken.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Intelenet.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-93-329 IS GRANTED, and Intelenet is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, Metromedia's Tariff FCC No. 2, and West Coast Telecommunications' Tariff FCC No. 1 between the U.S. and the international points listed in those tariffs.

6. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

9. IT IS FURTHER ORDERED that nothing in this authorization shall be construed to include authorization for the transmission of money in connection with the services Intelenet seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order shall be construed as containing authority for the transmission of money.

10. IT IS FURTHER ORDERED that the Petition to Deny filed by MFS Intelenet is hereby DENIED.

11. IT IS FURTHER ORDERED that the authority granted herein is subject to any decision which may be taken in a proper forum regarding the dispute as to the similarity of names.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-48

In re Applications of

HIGHLANDS BROADCASTING CO., INC. — File No. BPH-880211MK

Stoddard Johnson and Sherrie McCullough d/b/a J&M BROADCASTING COMPANY — File No. BPH-880211MN

For Construction Permit for a New FM Station on Channel 238A at Carmel, California

MEMORANDUM OPINION AND ORDER

Adopted: September 27, 1994; Released: October 6, 1994

By the Commission:

1. This memorandum Opinion and order denies a Petition for Extraordinary Relief, filed May 24, 1994, by Highlands Broadcasting, Inc. (Highlands).[1]

I. BACKGROUND

2. Highlands and J&M are the remaining applicants for a new FM radio station in Carmel, California.[2] The Commission granted J&M's application and denied Highland's. *Lone Cypress Radio Associates, Inc.*, 7 FCC Rcd 4403 (Rev. Bd. 1992), *rev. denied*, 8 FCC Rcd 972 (1993), *recon. denied*, 8 FCC Rcd 6635 (1993). Highlands and J&M both received 100 percent credit for integration of ownership into management. 7 FCC Rcd at 4403-04 ¶ 3. J&M was preferred over Highlands because its integration was enhanced by long-term local residence and civic activities, minority ownership, and broadcast experience. Highlands appealed the Commission's action on October 8, 1993.

3. On December 6, 1993, the Commission issued J&M a construction permit for its new facilities. The station began operating later that month under the call sign KBOQ-FM.

4. Meanwhile, on December 17, 1993, during the pendency of Highlands appeal, the court, in *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993), found the Commission's integration criterion arbitrary and capricious and therefore unlawful. On May 16, 1994, the court, in response to a motion by Highlands, reversed and remanded this case for further consideration in light of *Bechtel*.

II. PETITION

5. By letter, dated March 18, 1994, J&M requested interim authority to operate KBOQ-FM pending further consideration of this proceeding. Highlands opposed J&M's request. Because no action had been taken on J&M's request and J&M nevertheless remained on the air, Highlands filed the petition now before us. Petition at 2. Highlands' petition, relying on *Consolidated Nine, Inc. v. FCC*, 403 F.2d 585 (D.C. Cir. 1968), argues that it would be inequitable to grant J&M interim operating authority. *See also Community First Corp. v. FCC*, 403 F.2d 578 (D.C. Cir. 1968). Highlands notes that in *Consolidated Nine* the court faulted the Commission for permitting the grantee in a comparative hearing to continue its existing service after a remand. According to Highlands, it is significant in light of *Consolidated Nine* that J&M's ongoing operations and investment might subtly prejudice the outcome of further proceedings. Highlands contends that depriving Carmel of KBOQ-FM's service is outweighed by the need to ensure fairness in this proceeding.

6. Highlands also argues that *Bechtel* has eliminated the basis for selecting J&M. Thus, according to Highlands, J&M has no valid authorization which could be continued pending further proceedings, and a temporary grant of authority could be made only under extraordinary circumstances. Highlands further asserts that, if the Commission finds that interim operation is justified here, it should solicit applications for interim operating authority from non-parties. Additionally, Highlands requests the Commission to direct that KBOQ-FM should be operated on a non-profit basis to prevent prejudice to Highlands.

7. J&M contends that well-established Commission policy permits the recipients of construction permits in comparative hearings to continue operation in cases where the court of appeals remands a case for further consideration without directing that a specific procedure be followed.[3] In particular, J&M asserts that Highland's reliance on *Consolidated Nine* is misplaced, since *Consolidated Nine* involved a situation in which the court ordered a new hearing with new applicants.

8. J&M further claims that the circumstances in this case favor its continued operation. It maintains that no prejudice will result from its continued operation and that it would suffer financial hardship if forced to terminate operation. J&M also submits that both it and Highlands accepted the pre- *Bechtel* criteria as decisional in this proceeding, that appointment of a third party interim operator would be a lengthy and burdensome process, and that Carmel should not be deprived of service by KBOQ-FM.

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[1] Also before the Commission is an Opposition to Petition for Extraordinary Relief, filed June 1, 1994, by J&M Broadcasting Co., Inc. (J&M).

[2] Lone Cypress Radio Associates Incorporated did not appeal the denial of its application, which is now final. Its name has therefore been deleted from the caption.

[3] J&M also contends that Highlands' petition should be dismissed as an unauthorized response to J&M's March 18 letter, which has already been subject to a full pleading cycle. However, it appears that there has been some uncertainty as to the proper means of raising the issues addressed in the pleadings before us. Petition at 2 n.2. We find that considering the merits of Highlands' petition is the most efficient means of resolving this matter. In light of the action we take herein, J&M's letter is moot.

III. DISCUSSION

9. We find that continued operation by J&M is consistent with law and would serve the public interest. Pursuant to our authority under 47 U.S.C. § 154(i), we have the discretion to maintain J&M's existing service in the public interest following remand, provided that it does not prejudice Highlands. *See KDAB, Inc.*, 91 FCC 2d 277, 284-85 ¶ ¶ 14-15 (1982). In this regard, it is appropriate for us to balance the public interest in continuing J&M's existing service with the potential harm to the fair consideration of Highlands' application. *La Star Cellular Telephone Co. v. FCC*, 899 F.2d 1233, 1235 (D.C. Cir. 1990).

10. This situation does not, however, call into play 47 C.F.R. § 73.3592, the rule regarding interim operating authority in broadcast comparative proceedings. The rule reflects a judgment that, at the commencement of a comparative hearing, there are only limited circumstances in which the public interest favors establishing a new service on a temporary basis. Indeed, we no longer routinely entertain applications for interim operating authority at all in comparative proceedings. *Phoenix Media Corp.*, 2 FCC Rcd 498, 500 n.4 (1987); *Angeles Broadcasting Network*, 1 FCC Rcd 260, 263 n.10 (1986). On the other hand, the remand of a proceeding in which the public already receives service from an applicant which validly relied on a Commission grant presents a different balancing of public interest factors.

11. In this regard, *Consolidated Nine* set aside an award of interim operating authority made, after remand, to a grantee in a comparative hearing under circumstances significantly different from those here. The court in *Consolidated Nine* noted that the case did not simply involve a remand to determine whether a prior comparative hearing had been properly conducted, but involved a remand to conduct a new comparative hearing with new applicants for both permanent and interim authority. 403 F.2d at 591. Moreover, the court noted that the Commission had explicitly undertaken to entertain mutually exclusive applications for interim operating authority pursuant to the predecessor of 47 C.F.R. § 73.3592. *Id.* at 595. The opinion indicated that, in the absence of those circumstances, precedent supported an order permitting the grantee to continue its existing service. *Id.* at 591, *citing, WORD, Inc.*, 1 FCC 2d 1377, 1378 (1965). *See also WORD, Inc. v. FCC*, 268 F.2d 889, 890 (D.C. Cir. 1959) (the Commission had discretion to continue existing service by the grantee).

12. Unlike the case of *Consolidated Nine*, the remand here does not require reopening the proceeding to entertain new applications for either interim or permanent authority. The remand raises only the question of which of the remaining two long-pending applications for permanent authority should be granted. In this context, we find nothing in *Consolidated Nine* that would deprive the Commission of the discretion to allow the existing service to continue if we find, as we do, that the mandatory termination of the service would not serve the public interest. The public interest does not favor withdrawing J&M's existing local service from its listeners or having J&M's facilities lie fallow. We find it unlikely that the temporary maintenance of J&M's service will cause prejudice to Highlands, since we anticipate evaluating J&M and Highlands under comparative criteria that give J&M no credit for its temporary service. When J&M chose to construct its station, it assumed the risk that the comparative decision in its favor may not survive at the end of this proceeding. Nothing in today's decision can, or is intended to, change the fact that J&M bears this risk.

IV. ORDERS

13. ACCORDINGLY, IT IS ORDERED, That the Petition for Extraordinary Relief, filed May 24, 1994, by Highlands Broadcasting, Inc. IS DENIED.

14. IT IS FURTHER ORDERED, That continued operation of J&M's station IS AUTHORIZED pending further order of the Commission.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMCAST CABLEVISION OF TALLAHASSEE, INC.

Request for Stay of Rate Reconsideration Order of the City of Tallahassee Pending Appeal

ORDER

Adopted: September 30, 1994; Released: September 30, 1994

By the Chief, Cable Services Bureau:

1. On August 2, 1994, Comcast Cablevision of Tallahassee, Inc. ("Comcast"), filed with the Commission a request for a stay of the local rate order on reconsideration adopted by the city of Tallahassee ("City") on July 13, 1994, concerning basic service and equipment rates.[1] Comcast seeks a stay pending Commission resolution of its appeal of the reconsideration order[2] and resolution of the outstanding Letter of Inquiry which was issued to Comcast and which remains pending before the Commission.[3] The reconsideration order establishes a new schedule of basic service and equipment rates and directs Comcast to issue refunds. Comcast asserts that if a stay of the reconsideration order is not granted, it will be required to make refunds to subscribers of approximately $550,000 for overages charged since September 1, 1993, and may be subject to a future annual revenue loss for equipment and installation and programming services of over $600,000. The City opposes the stay request.

2. One of the issues raised by Comcast in its request for stay centers on the regulatory treatment of Comcast's a la carte offerings.[4] In its stay request, Comcast argues that the City improperly disallowed a la carte treatment to its four-channel "Value Pak" discounted package of channels and subjected them to rate regulation. The "Value Pak" offering is the subject of a Letter of Inquiry to Comcast currently pending before the Commission. Given that a significant aspect of Comcast's stay request overlaps closely with the issues raised in the Letter in Inquiry and in order to ensure regulatory consistency, we will stay the effective date of Tallahassee's reconsideration order until the Commission releases a determination concerning the Letter of Inquiry related to this case.

3. In its request for stay, Comcast incorporates arguments it made in an earlier application for review opposing the requirements that Comcast (1) deposit money in an escrow account in order to cover potential refunds and (2) notify subscribers of the possibility that they may receive a refund, and to advise subscribers who may be planning to relocate outside the franchise area to provide Comcast with a forwarding address to which refunds may be delivered.[5]

4. Comcast argues that a requirement that potential refunds be placed in a cash escrow account is an unnecessary and burdensome requirement. Comcast indicates that if some form of security is required, it should be permitted to post a bond in lieu of depositing in an interest-bearing escrow account the amount of the refunds required in the City's rate order. Comcast posted a bond with the United States District Court for the Northern District of Florida as a condition of the Court staying the City's initial rate order and argues that it should be allowed to do so here.[6] Comcast assures us that this arrangement will adequately protect the interests of subscribers. Comcast explains that the purpose of such a bond is for a third party to guarantee that Comcast's obligations are fulfilled. The surety's guarantee is absolute. If for any reason, Comcast is unable to fulfill its refund obligations, then the surety guarantees to the City, on behalf of Comcast's subscribers, full payment of those obligations.[7] Accordingly, we will permit Comcast to post a bond for the benefit of the City. The amount of

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[1] *See* Request for Expedited Consideration by Comcast Cablevision of Tallahassee, Inc., for Stay of a Rate Reconsideration Order of the City of Tallahassee Pending Appeal (filed August 2, 1994) ("Reconsideration Stay Request"). The order which was subject to reconsideration was originally adopted by the City on March 9, 1994. Comcast's appeal of that order was dismissed by the Commission on August 29, 1994, pursuant to Comcast's request and an agreement between the parties which provided for the City's reconsideration of the March 9, 1994, order.

[2] *See* Appeal of Comcast Cablevision of Tallahassee, Inc., from a Rate Reconsideration Order of the City of Tallahassee (filed August 15, 1994).

[3] Letter of Inquiry to Comcast, File No. LOI-93-2 (November 17, 1993).

[4] We note that Comcast's stay request raises a number of other contentions with respect to the City's reconsideration order. The contentions include: (1) whether the City improperly compared Comcast's actual rates for basic cable service to a figure derived from the benchmark formula rather than to a figure from the benchmark table appended to the FCC Form 393, as selected by Comcast; (2) whether the City used incorrect data in completing the FCC Form 393 worksheets; (3) whether the City improperly extended to bulk rate subscribers the lowest bulk rate that Comcast offers; (4) whether the City prescribed unreasonably low charges for installation of additional outlets; (5) whether the City improperly invalidated Comcast's treatment of subscriber drops; (6) whether the City improperly computed Comcast's installation hours and disallowed the methodology that Comcast used in accounting for contract installers; and (7) whether the City improperly disallowed Comcast's "Cableguard" charge for the maintenance of customer-owned equipment.

[5] *See* Application for Review of an Order Granting in Part a Request for Stay Filed by Comcast Cablevision of Tallahassee, Inc. (filed June 8, 1994) (seeking review of order granting, in part, stay of City's initial rate order); Reconsideration Stay Request at 35.

[6] *See* Letter of Peter H. Feinberg, Counsel for Comcast, to Mary Ellen Burns, Chief of the Consumer Protection Division, Cable Services Bureau, September 23, 1994, and attached affidavit of Eileen Lucitt, Attorney-In-Fact for Aetna Casualty and Surety Company, which sets forth the parameters of the bond proposed by Comcast.

[7] *Id.*

the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order.

5. In several recent orders granting stay requests similar to Comcast's, we eliminated the requirement that operators notify and track subscribers.[8] We determined that the requirement was unnecessary in those cases since our rules give the operator the option of implementing a refund by either returning overcharges to those subscribers who actually paid the overcharges or by issuing a one-time credit on prospective bills to current subscribers.[9] Here, Comcast states that, in the event that it loses its appeal and is required to issue refunds, it intends to refund monies to existing, rather than past, subscribers.[10] As a result, we will not require Comcast to notify subscribers of the possibility of their receiving refunds nor to maintain the forwarding addresses of subscribers who relocate outside of the area.

6. Accordingly, IT IS ORDERED that the Request for Expedited Consideration by Comcast Cablevision of Tallahassee, Inc., for Stay of a Rate Reconsideration Order of the City of Tallahassee Pending Appeal IS GRANTED. Specifically, the effective date of the Reconsideration Order adopted by the City of Tallahassee concerning rates for regulated basic cable service and associated equipment provided by Comcast is STAYED until the earlier of a date ten (10) days after the release of an Order or Orders by the Commission finally resolving the issues raised in the Letter of Inquiry to Comcast or the resolution of the instant appeal.

7. IT IS FURTHER ORDERED that Comcast post a bond for the benefit of the City of Tallahassee. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. Proof of this SHALL BE FILED with the Commission and the City within thirty (30) days of the release of this Order. Interest shall be computed at the prevailing U.S. Internal Revenue Service Rate.

8. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

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[8] *See Order* (Request for Stay of Local Rate Order of City of the City of Mount Clemens), DA 94-857, ¶ 6 (released Aug. 9, 1994); *Order* (Petition for Stay of Local Rate Order of City of Wadsworth, OH), DA 94-858, ¶ 4 (released Aug. 9, 1994); *Order* (Petition for Stay of Local Rate Order of City of La Habra, CA), DA 94-859, ¶ 4 (released Aug. 9, 1994); Order (Petition for Stay of Local Rate Order of City of Brea, CA), DA 94-860, ¶ 4 (released Aug. 9, 1994); *Order* (Request for Stay of Local Rate Order of the Consolidated Cable Communications Commission for Portland, Multnomah County, and Linton, Oregon Franchise Areas), DA 94-861, ¶ 8 (released Aug. 9, 1994).

[9] *See* 47 C.F.R. §76.942(d) (1994).

[10] Reconsideration Stay Request at 35.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PARAGON CABLE

Petition for a Stay
of a Local Rate Order of the
City of Grapevine, TX

ORDER

Adopted: September 30, 1994; Released: September 30, 1994

By the Chief, Cable Services Bureau:

1. Paragon Cable ("Paragon"), the franchisee in the instant case, filed on August 15, 1994, a Petition for Stay of Enforcement ("Stay Petition") of the local rate order adopted by its local franchising authority, the City of Grapevine, Texas ("City") on July 5, 1994. Paragon filed a Petition for Review ("Appeal") of the City's local rate order on August 5, 1994. The City filed a response to Paragon's Appeal and Stay Petition on September 14, 1994. The local rate order in question establishes a new rate schedule for Paragon's basic service tier and associated equipment, and directs Paragon to issue refunds to subscribers for charges in excess of the newly established rates between September 1, 1993 and July 14, 1994.[1] The sole issue raised by Paragon in its Stay Petition centers on the regulatory treatment of Paragon's a la carte offerings.[2]

2. The Commission has issued numerous Letters of Inquiry to cable operators regarding the regulatory treatment of a la carte offerings. While a Letter of Inquiry has not been issued to the operator in this case, we will grant Paragon's Stay Petition pending the resolution of its Appeal on the merits, in order to minimize subscriber confusion and ensure regulatory consistency in this important area, as the Commission has done in other similar cases.[3]

3. During the period of this stay, Paragon is ordered to deposit in an interest-bearing escrow account the total amount of money that the City has ordered Paragon to refund to its customers. Alternatively, Paragon may elect to post a bond for the benefit of the City. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. The bond shall provide that if Paragon is unable to fulfill its refund obligations for any reason, then the surety will fulfill that obligation to the City, on behalf of Paragon's subscribers.[4]

4. Accordingly, IT IS ORDERED that the local rate order adopted by the City of Grapevine, Texas is STAYED pending the resolution of Paragon Cable's Appeal. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

5. IT IS FURTHER ORDERED that the amount of the refunds required by the City of Grapevine's local rate order SHALL BE PLACED by Paragon Cable in an interest-bearing escrow account, OR SHALL BE SECURED by the posting of a bond for the benefit of the City for the amount of money the City has ordered Paragon to refund, plus interest. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. Proof of Paragon's compliance with this Order shall be filed with the Commission within thirty (30) days of the release of this Order. Interest shall accrue, or be computed, at the prevailing U.S. Internal Revenue Service Rate.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

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[1] Under the Cable Television Consumer Protection and Competition Act of 1992 and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b) (1993).

[2] A la carte offerings are channels that can be subscribed to individually or as part of a package.

[3] See, *Paragon Cable of Southern California* (Brea, CA), DA 94-512 (Rel. May 17, 1994); *Paragon Cable of Southern California* (La Habra, CA), DA 94-513 (Rel. May 17, 1994); *Warner Cable Communications, Inc.* (Wadsworth, OH), DA 94-511 (Rel. May 17, 1994).

[4] See, *Comcast Cablevision of Tallahassee, Inc.*, DA 94-1071, released this date, in which the Commission authorizes the operator to post a bond in lieu of establishing an escrow account. As we are requiring in *Comcast*, we would expect any bond posted by Paragon to provide that the surety's guarantee is absolute.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 94-106

In the Matter of

Petition of the Connecticut Department of Public Utility Control to Retain Regulatory Control of the Rates of Wholesale Cellular Service Providers in the State of Connecticut

ORDER

Adopted: September 28, 1994; Released: September 29, 1994

By the Chief, Private Radio Bureau:

1. Richard Blumenthal, Attorney General of the State of Connecticut, the Connecticut Office of Consumer Counsel, Connecticut Telephone and Communication Systems, Inc. and Connecticut Mobilecom, Inc. (collectively Movants) have filed a motion for a 15-day extension of time from the October 4, 1994 deadline for filing reply comments.[1] For the reasons given below, we grant the motion.

2. The amendments to the Communications Act in the Omnibus Budget Reconciliation Act of 1993 preempted state rate and entry regulation of commercial mobile radio services. A state could, however, obtain intrastate rate regulatory authority by filing a properly supported petition with the FCC.[2] States with existing rate regulation could petition by August 10, 1994 to continue regulating, and would obtain a stay of statutory preemption until the FCC acted. The Commission has one year in which to rule on the petition and to decide any reconsideration. New York filed such a petition on August 9, 1994. Pursuant to the Commission's rules,[3] interested parties had 30 days in which to comment and then 15 days for replies.

3. Movants, who support the petition of the Connecticut Department of Public Utility Control, state that they need the requested extension to analyze the filings of the parties opposing the petition, which contain "putative antitrust, competitive and economic analyses of the cellular markets as well as other testimony."[4] They state that grant of this "modest" extension will ensure a complete record in this proceeding and facilitate a timely Commission decision in the proceeding.[5]

4. We believe that the motion has merit. The record in this proceeding is large, and the issues, including the state of competition in the cellular market in the state and the reasonableness of rates, intricate. We find that good cause has been shown for the requested extension.

5. Pursuant to Section 1.46 of the Commission's Rules,[6] we GRANT the Joint Motion for Extension of Time of Richard Blumenthal, Attorney General of the State of Connecticut, the Connecticut Office of Consumer Counsel, Connecticut Telephone and Communication Systems, Inc. and Connecticut Mobilecom, Inc., AND HEREBY EXTEND the period for filing replies UNTIL October 19, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

[1] Joint Motion for Extension of Time (dated Sept. 26, 1994) (Motion).
[2] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (b)(2), 107 State. 312, 392 (1993), amending Section 332 (c)(3) of the Communications Act, 47 U.S.C. § 332 (c)(3).
[3] Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1522-23 (1994), 59 Fed. Reg. 18493 (Apr. 19, 1994) (to be codified at 47 C.F.R. § 20.13).
[4] Motion at 2.
[5] Motion at 2-3.
[6] 47 C.F.R. § 1.46.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-119

In the Matter of

Amendment of Section 73.202(b), RM-8104
Table of Allotments,
FM Broadcast Stations.
(Hermitage, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 30, 1994; Released: October 6, 1994

Comment Date: November 28, 1994
Reply Comment Date: December 13, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by KYOO Broadcasting Company ("petitioner"), seeking the allotment of Channel 226A to Hermitage, Missouri, as that community's first local service.[1] Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.[2]

2. We believe petitioner's proposal warrants consideration. Channel 226A can be allotted to Hermitage, Missouri, consistent with the Commission's spacing requirements provided there is a site restriction 13.1 kilometers (8.1 miles) east of the community.[3] The site restriction will prevent a short spacing to Station KMXV, Channel 227C, Kansas City, Missouri. Although Channel 226A at Hermitage is currently short spaced to Station KYOO-FM, Channel 226A, Half Way, Missouri, the license for Station KYOO-FM was modified in MM Docket 93-186 to specify operation on Channel 256A in lieu of Channel 226A.[4] Therefore, the grant of a license for Channel 226A at Hermitage may be withheld until Station KYOO-FM, Half Way, is licensed on the new channel.

3. In view of the fact that the proposed allotment would provide a first local service to Hermitage, Missouri, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hermitage, Missouri	---	226A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 28, 1994**, and reply comments on or before **December 13, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

William J. Pennington, III
Post Office Box 4203
Wilmington, North Carolina 28406

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served

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[1] Petitioner is the licensee of Station KYOO-FM, Half Way, Missouri.

[2] The Commission adopted new local ownership rules based on market size and audience share which enables petitioner to file an application for Channel 226A at Hermitage, if allotted. For stations in markets with 14 or fewer radio stations, a single licensee will be permitted to own up to three stations, no more than two of which are in the same service, provided that the owned stations represent less than 50 percent of the stations in the market. *See* 47 C.F.R. Section 73.3555(a)(1)(i). *See also Revision of Radio Rules and Policies, Memorandum Opinion and Order and Further Notice of Proposed Rule Making*, 7 FCC Rcd 6387 (1992). Petitioner did not provide information showing it is eligible to acquire a second station at Hermitage, and is therefore requested to do so in its comments.

[3] The coordinates for Channel 226A at Hermitage are 37-56-00 and 93-10-00.

[4] The *Report and Order* in MM Docket 93-186 was adopted September 12, 1994.

on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1),303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-321

In the Matter of

Amendment of Section 73.202(b), RM-8409
Table of Allotments,
FM Broadcast Stations.
(Ocean Isle Beach, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1994; Released: October 6, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Ocean Isle Broadcasting Company ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 501 (1994), proposing the allotment of Channel 228A to Ocean Isle Beach, North Carolina, as the community's first local aural transmission service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 228A to Ocean Isle Beach since it could provide the community with its first local aural transmission service.

Technical Summary

3. Channel 228A can be allotted to Ocean Isle Beach in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.3 kilometers (2.7 miles) west to avoid a short-spacing to vacant but applied-for Channel 229A at Wrightsville Beach, North Carolina.[1] We recognize that the allotment at Ocean Isle Beach is short-spaced to the presently licensed facility of Station WLTT (formerly Station WDZD), Channel 228A, Shallotte, North Carolina. However, pursuant to the modification of Station WLTT's license to specify operation on Channel 279C3, a construction permit specifying the new channel has been granted and the licensee has filed an application for license to cover its construction permit (BLH-940210KA). Therefore, final action on a construction permit application for Channel 228A at Ocean Isle Beach may be withheld pending the licensing of Station WLTT at the site specified in its construction permit.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective November 21, 1994, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Ocean Isle Beach, North Carolina	228A

5. The window period for filing applications will open on **November 22, 1994**, and close on **December 23, 1994**.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 228A at Ocean Isle Beach are 33-53-40 North Latitude and 78-28-26 West Longitude.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-248

In the Matter of

Amendment of Section 73.202(b),	RM-8105
Table of Allotments,	
FM Broadcast Stations.	
(Southern Shores, North Carolina)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1994; Released: October 7, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Joseph A. Booth ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 7561 (1992), proposing the allotment of Channel 265C2 to Southern Shores, North Carolina, as the community's first local aural transmission service. Comments in support of the allotment were filed by the petitioner and Kermit Alvin Kennedy. Each of the parties has stated his intention to apply for the channel, if allotted. No other comments were received.

Technical Statement

2. Channel 265C2 can be allotted to Southern Shores in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction, at coordinates North Latitude 36-06-30 and West Longitude 75-43-20. We recognize that this allotment is short-spaced to the allotment coordinates for Channel 266C2 at Belhaven, North Carolina. However, a construction permit has been issued to Station WKJA at Belhaven at coordinates which do not conflict with this proposal and Station WKJA has since filed an application for a license to cover the construction permit (BLH-931214KG). Therefore, we believe the public interest would be served by allotting the Southern Shores channel at this time. However, final action on a construction permit application for Channel 265C2 at Southern Shores may be withheld pending the licensing of Station WKJA at the site specified in its construction permit.

3. We believe the public interest would be served by allotting Channel 265C2 to Southern Shores since it could provide the community with its first local aural transmission service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 21, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Southern Shores, North Carolina	265C2

4. The window period for filing applications will open on **November 21, 1994**, and close on **December 23, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-22

In the Matter of

Amendment of Section 73.202(b), RM-8438
Table of Allotments,
FM Broadcast Stations.
(Jackson, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1994; Released: October 7, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Roosevelt Gremillion ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 1543 (1994), proposing the allotment of Channel 283A to Jackson, Louisiana, as the community's first local aural transmission service. Petitioner filed comments restating his interest to apply for Channel 283A, if allotted.[1]

2. We believe the public interest would be served by allotting Channel 283A to Jackson, since it could provide the community with its first local aural transmission service. Channel 283A can be allotted to Jackson in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 21, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Jackson, Louisiana	283A

4. The window period for filing applications will open on **November 21, 1994**, and close on **December 23, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] As stated in the *Notice*, petitioner failed to include an affidavit verifying his statements, therefore petitioner was requested to comply with the requirements of Section 1.52 of the Commission's Rules. In response, petitioner submitted an affidavit, thus, his initial failure to fulfill all subscription and verification requirements has been remedied.

[2] The coordinates for Channel 283A at Jackson are North Latitude 30-50-18 and West Longitude 91-13-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-275

In the Matter of

Amendment of Section 73.202(b), RM-8373
Table of Allotments,
FM Broadcast Stations.
(Pioche, Nevada)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 30, 1994; Released: October 7, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Keith E. Lamonica ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 8 FCC Rcd 7914 (1993), proposing the allotment of Channel 255A to Pioche, Nevada, as the community's first local aural transmission service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 255A to Pioche since it could provide the community with its first local aural transmission service. Channel 255A can be allotted to Pioche in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 21, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Pioche, Nevada	255A

4. The window period for filing applications will open on **November 21, 1994**, and close on **December 23, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 255A at Pioche are North Latitude 37-55-47 and West Longitude 114-27-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Telephone Operating Companies Tariff F.C.C. No. 1	Transmittal No. 900
GTE System Telephone Companies Tariff F.C.C. No. 1	Transmittal No. 102
US West Communications Tariff F.C.C. No. 5	Transmittal No. 519
The Southern New England Telephone Tariff F.C.C. No. 39	Transmittal No. 621

ORDER

Adopted: September 29, 1994; Released: September 29, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On August 4, 1994, the above-captioned local exchange carriers (LECs) filed tariff transmittals to establish the Government Emergency Telecommunications Service (GETS). GETS is a new service offered by the United States Government's National Communications System (NCS) that will provide authorized National Security and Emergency Preparedness (NS/EP) personnel with access to the public switched network when other normal channels of communication are not available. The Secretary of Defense, Executive Agent of the NCS, filed a petition to suspend and investigate the above-captioned transmittals, and the LECs filed replies. The above-captioned transmittals are scheduled to become effective on September 30, 1994.

2. GETS will use a 710 Numbering Plan Area (NPA) code that is reserved for NS/EP use. When emergency conditions arise, an authorized GETS user will dial 1+710 NCS-GETS (632-4387), enter a Personal Identification Number (PIN) for authentication, and then dial the number of the called party. The provisioning of GETS requires all LECs to open the 710 NPA code in all wire centers designated by the NCS. The LECs must program their switching offices so that GETS traffic can be properly routed to the presubscribed interexchange carrier chosen by the user.[1] The only charges imposed by the LECs for GETS are non-recurring charges to activate the 710 code.

3. NCS opposes the imposition by the LECs of non-recurring charges to activate the 710 code. NCS first argues that these non-recurring charges, ranging from $3,786 for Southern New England Telephone (SNET) to $37,455 for GTE Telephone Operating Companies (GTOC), constitute an unreasonable practice prohibited by Section 201(b) of the Act, 47 U.S.C. § 201(b), because the "vast number" of LECs are opening the 710 code for GETS without filing tariffs. NCS Petitions (all LECs) at 6. NCS next contends that the proposed non-recurring charges are unreasonably discriminatory in violation of Section 202(a), 47 U.S.C. §202(a), because the 710 code is functionally equivalent to other NPA codes and LECS normally pay for the opening of a new NPA code through usage charges. *Id.* at 4-5.

4. NCS then argues that GTOC, GTE System Telephone Companies (GSTC), and US West Communications (US West) have not provided sufficient cost justification to support their non-recurring charges. NCS Petition against GTOC at 6-7, GSTC at 6, and US West at 6-7. In particular, NCS disagrees with the imposition of per-office charges for activating the 710 NPA code and questions the methodologies used by GTOC, GSTC and US West to justify the non-recurring charges. *Id.* NCS further contends that the proposed non-recurring charges will overcompensate the LECs for the expenses incurred in opening the 710 NPA code because Part 69 of the Commission's rules requires the LECs to include these expenses in their access tariffs. NCS Petition against GTOC at 7-8, GSTC at 6-7, US West at 6-7, and SNET at 6-7. Finally, NCS argues that the LECs will not incur unreimbursed costs for opening the 710 NPA code for GETS because they will be compensated for these costs by receiving increased revenue as they add new features to GETS. NCS Petition against GTOC at 8, GSTC at 7-8, US West at 7-8, and SNET at 7.

5. In response, the LECs disagree that the proposed tariffs are unreasonable and thus violate Sections 201. GTE Reply at 2; US West Reply at 6; SNET Reply at 2. US West states, for example, that six of the eight LECS involved with GETS are planning to charge for opening the 710 access code and that three of these LECs have already filed tariffs. US West Reply at 6. The LECs also respond that the 710 code is not functionally equivalent to any other NPA codes so imposing a charge for opening up the 710 code is not discriminatory. The LECs note that unlike other area codes, the 710 NPA code has been assigned to the exclusive use of authorized government users, will have only one number assigned to it, is limited to emergencies and test calls only, and is not available to the general public. GTE Reply at 2-3; US West Reply at 5-6; SNET Reply at 2-3. The LECs also note that GETS calls are specifically routed to only three select interexchange carriers and that the 710 code does not provide for geographic routing of the call. *Id.*

6. US West maintains that the imposition of non-recurring charges to NCS for the expenses incurred in activating the 710 code is consistent with the Commission's decisions. US West Reply at 8, citing *Investigation of Interstate Access Tariff Non-Recurring Charges*, 2 FCC Rcd 3498 (1987). Furthermore, US West and GTE believe that the rates that they propose were developed using methodologies that are consistent with the Commission's policies. US West Reply at 7-8; GTE Reply at 4-6. Moreover, US West and GTE assert that a per-office charge is appropriate because of the

[1] *See, e.g.*, SNET Transmittal No. 621, Description and Justification (D&J) at 2.

need to monitor the software encoding and testing process for each end office and tandem switch. US West Reply at 7; GTE Reply at 4.

7. The LECS also disagree with NCS that they can recover the costs of activating the 710 code by including these costs in their access tariffs. GTE Reply at 6-7; US West Reply at 8-9; SNET Reply at 3-4. US West maintains that the Commission rejected this argument in favor of its policy of encouraging the recovery of costs from the cost-causer. US West Reply at 8-9, citing *In the Matter of National Security Emergency Preparedness Telecommunications Service Priority System*, 3 FCC Rcd 6650, 6661 (1988). In any event, SNET notes that it has no assurance that it will receive sufficient access minutes from GETS to recover its costs of activating the 710 code. SNET Reply at 4. Finally, US West and SNET disagree with NCS that the payments that they will receive from providing new features to GETS will compensate them for opening the 710 NPA code, saying that any revenue that they receive from new GETS features will merely recover the costs of providing those features. US West Reply at 9; SNET Reply at 4.

8. We have reviewed the above-captioned tariff transmittals and all associated submissions. We conclude that no compelling argument has been presented that an investigation of these tariffs is warranted at this time.

9. Accordingly, IT IS ORDERED that the petitions to suspend and investigate the above-captioned tariff transmittals filed by the Secretary of Defense, Executive Agent of the National Communications System, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-215

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992 -- Rate Regulation

MEMORANDUM OPINION AND ORDER

Adopted: September 2, 1994; Released: September 29, 1994

By the Commission:

I. BACKGROUND

1. In the initial *Rate Order*, released in May 1993, we adopted a price cap mechanism to govern rates for regulated cable service after initial rates have been established.[1] Under the price cap, cable operators are permitted to adjust their capped rates to reflect costs attributable to inflation as measured by the Gross National Product - Price Index (GNP-PI), as well as for changes in external costs.[2] We declined, however, to adopt a productivity offset to the GNP-PI because the record did not provide a basis for determining productivity gains in the cable industry.[3]

2. In the initial *Cost-of-Service Notice*, released in July 1993, we sought comment on whether the cable television industry has been or will be experiencing efficiency gains and on several alternatives for establishing a productivity offset.[4] In the Further Notice in this proceeding, released in March 1994, we tentatively concluded that cable operators should reasonably expect to achieve productivity gains that are comparable to those realized by other communications firms. We noted that cable television and telephone technologies are similar in many ways and have both benefited from technical advances. We stated, however, that while both industries are likely to continue improving their productivity, in the near term, the productivity gains that cable may reasonably expect to achieve may differ from those of telephone operations due to differences in their networks, operations, services and histories. Accordingly, we tentatively concluded that the record did not support the automatic adoption of the same productivity factor for cable systems as local telephone companies.[5] We proposed, and sought comment on, a two percent productivity offset.[6] In the Further Notice, we also tentatively concluded that programming costs should not be subject to any productivity offset. We stated that we did not wish to indirectly restrict the ability of programmers to obtain fair value for their products.[7]

II. COMMENTS

3. In response to the Further Notice, cable operators contend that a productivity offset would be inappropriate for the cable industry. They argue that the record in this proceeding does notp adequately support a productivity offset of two percent, or of any particular level for that matter. Time Warner, for example, notes that only one party offered a specific offset figure which, Time Warner asserts, apparently is based on its use in state regulation of local exchange carriers ("LECs") and not on any serious inquiry into the economics of the cable industry, and is not supported by any economic analysis.[8] These commenters argue that differences between the telephone and cable industries dictate that a productivity offset for the cable industry should not be based on an offset incorporated in the interstate telephone price cap scheme. These differences, according to commenters, are: (1) the relative easing of telephone rate regulation as compared to the re-regulation of cable systems currently underway;[9] (2) differing fixed equipment costs;[10] and (3) the differing units by which productivity growth is measured in the two industries.[11] NCTA explains that the units of regulatory measurement for interstate telephone calls can be either the number of calls completed or the number of minutes of such calls. These units can expand within the system's

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[1] *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order*, MM Docket No. 92-266, 8 FCC Rcd 5631, 5776 (1993) (*"Rate Order"*).

[2] External costs are retransmission consent fees, programming costs, taxes, franchise fees, and costs of complying with franchise requirements. *Id.* at 5783 - 5790.

[3] *Id.* at 5777 n.558.

[4] We specifically sought comment on four possible options: (1) no productivity offset; (2) a consumer productivity dividend of 0.5%; (3) a telecommunications industry adjustment of between 3.0% and 3.3%; and (4) a different productivity offset for cable operators. *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket No. 93-215, Notice of Proposed Rulemaking, FCC 93-353 (released July 16, 1993) (*"Cost-of-Service Notice"*), at para. 85.

[5] *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking*, FCC 93-39, MM Docket. No. 93-215 (released March 30, 1994) (*"Further Notice"*) at para. 319.

[6] *Id.* at para. 320.

[7] *Id.* at para. 322.

[8] Time Warner Comments at 31 (referencing the comments to the *Cost-of-Service Notice* of the New Jersey Board of Regulatory Commissioners at 11). *See also* NCTA Comments at 12; TCI Comments at 50-51; Liberty Media Comments at 23-4. NCTA attached a study prepared by Christensen Associates examining the productivity, as measured by subscribership, of three cable multiple system operators covering six percent of the nation's cable subscribers. The study concludes generally that there is no basis for applying a positive productivity offset to the price cap governing cable systems' rates. NCTA Comments at 16.

[9] Comcast Comments at 14.

[10] Time Warner argues that telephone companies achieved much of their recent productivity growth through innovations in computer switching, while cable operators' primary future costs still reside in the actual transmission lines and their eventual replacement by fiber optics. Time Warner Comments at 33.

[11] NCTA Comments at 20-22.

capacity even if subscribership remains constant, and can grow rapidly in response to price decreases, it states. Thus, according to NCTA, it may be appropriate to have a productivity offset on the price of a call or a call minute as the incremental cost of each unit falls. NCTA states that, in contrast, the unit of regulatory measurement for regulated basic cable service is the number of basic cable subscribers; intensity of usage is irrelevant. NCTA argues that a price reduction for basic cable service will not induce households that already purchase service to purchase more service. NCTA contends that only in areas of low penetration will subscribership change in response to a price decrease, while in areas of high penetration, price decreases likely will not lead to substantial percentage increases in subscribership. NCTA thus asserts that these differences in the units of regulatory measurement further demonstrate the inappropriateness of deriving a productivity offset from the telephone regulatory regime into the cable service price cap scheme.[12] NCTA also provides a study purporting to demonstrate that there has been no increase in productivity in the cable industry based on analyses of cable operators' costs. *Productivity Growth in the Cable Television Industry*, Christensen Associates. We note that Bell Atlantic has contended that NCTA's study would have shown productivity gains if the study also reflected the annual change in average number of active cable service channels.[13]

4. Cable operators also note that, in adopting a productivity offset for common carriers, the Commission reviewed numerous productivity studies demonstrating the historical productivity growth of telephone companies, including two independent studies as well as its own short-term study and a long-term study of the telephone industry covering more than 60 years. These parties contend that, given the absence of any studies or data concerning the cable industry, the Commission has no basis on which to determine or implement a productivity offset for the cable industry.[14] Cable operators further argue generally that a productivity offset will dampen the industry's incentives to invest in innovative video services and development of the National Information Infrastructure.[15] Commenters from the cable industry also object to the productivity offset proposal based on (1) the relative immaturity of the cable industry and its supporting technology;[16] (2) the fact that fiber optics and other necessary technological improvements may actually increase cable operators' costs in the near future;[17] and (3) their belief that the price cap, as measured by the GNP-PI, already captures purported efficiency gains.[18]

5. Commenters from the telephone industry, on the other hand, assert that cable operators' rates should be subject to a productivity offset because the current and near-term introduction of fiber optics and other technologies will greatly increase the efficiency of the cable industry. These efficiencies, the telephone companies argue, should be shared with cable operators' subscribers.[19] GTE and Bell Atlantic contend that the telephone and cable industries should have equivalent, or at least similar, productivity offsets given the industries' impending convergence in both technologies and services offered.[20] These commenters note that an offset has been applied to the rates of telephone companies since they became subject to price cap regulation, and argue that industries rapidly converging to compete in the same video programming distribution marketplace should be subject to similar regulatory rate constraints.[21]

III. DISCUSSION

6. A productivity offset should be based to the extent possible on observed efficiency gains experienced by the cable industry. An accurate productivity offset can assure that regulated cable service rates reflect a portion of the difference between demonstrated efficiency gains experienced by regulated cable operators, if any, and those gains produced in the economy as a whole, as measured by the Commission's chosen price cap index – the GNP-PI.[22] As such, a correctly designed offset can significantly benefit consumers while permitting cable operators also to share in efficiency gains. In adopting a productivity offset in other contexts, the Commission has had the benefit of numerous Commission-sponsored and independent economic studies, each providing a record of the historical costs and productivity of the relevant industry.

7. We believe that the current record does not provide an adequate factual basis for the incorporation of a productivity offset into the price cap governing cable service rates. The studies that have been submitted are insufficient to demonstrate observed productivity gains. Bell Atlantic's report is the only study submitted in response to the *Further Notice* purporting to provide an economic analysis in support of a productivity offsetfactor for cable service. However, the report's conclusion is not based on an analysis of costs or productivity in the cable industry; rather, the report essentially argues that cable operators should be subject to an offset, as required of telephone companies, given the rapid convergence of the two industries. No other studies or data have been submitted in support of a productivity offset. Thus, there is no factual basis in the record that would adequately support a two percent productivity offset. Accordingly, we decline to adopt our proposal to incorporate a productivity offset into the price cap governing cable operators' regulated rates for cable service.

8. Accordingly, IT IS ORDERED, that the proposed productivity offset set forth in the *Further Notice* in this proceeding IS NOT ADOPTED.

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[12] *Id.*

[13] Bell Atlantic Reply Comments at 9. *See infra* para. 7.

[14] *Id.* at 32-33; Continental Comments at 53; Comcast Comments at 14-15; TCI Comments at 51-52.

[15] Comcast Comments at 16; Continental Comments at 53; Viacom Comments at 19-20; CATA Comments at 8-9; Discovery Comments at 9.

[16] Time Warner Comments at 34.

[17] *Id.* at 33-4.

[18] Viacom Comments at 18.

[19] *See, e.g.*, Bell Atlantic Comments at 6.

[20] GTE Comments at 13-14; Bell Atlantic Comments at 3-6, and attached Declaration of Robert G. Harris, Associate Professor in the Walter A. Haas School of Business, University of California at Berkeley at paras. 7-13. *See also* Fred Williamson & Associates Comments at 5.

[21] *Id.* Mr. Harris' declaration notes several instances of cable systems using their fiber-supported networks to move into the information-transferral business. Declaration of Robert Harris at para. 16.

[22] *Further Notice* at para. 321.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 7365
Tariff F.C.C. No. 2

ORDER

Adopted: September 28, 1994; Released: September 29, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

1. On August 15, 1994, AT&T Communications (AT&T) filed Transmittal No. 7365 to eliminate the 800 Customer Specific Bonus Plan on August 29, 1994. The Bonus Plan provides discounts for several types of AT&T 800 Services for customers who commit to certain annual revenue levels throughout a period of several years. As amended, Transmittal 7365 is scheduled to take effect on September 29, 1994.[1]

2. On August 22, 1994, GE Capital Communication Services Corporation and Public Service Enterprises, Inc., filed petitions to reject, or suspend and investigate, Transmittal 7365. AT&T filed a reply on August 25, 1994.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 7365 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petitions do not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 7365, filed by GE Capital Communication Services Corporation and Public Service Enterprises, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

[1] On September 16, 1994, AT&T filed amended Application No. 2042 to make minor clarifications to language in Transmittal 7365 concerning the Bonus Plan. Further changes were made under Application No. 2070, which was filed on September 28, 1994.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-89

In re Applications of

AURIO A. MATOS File No. BPH-911114MS

LLOYD SANTIAGO-SANTOS AND LOURDES RODRIGUEZ BONET File No. BPH-911115MP

For Construction Permit for
New FM Station, Channel 293A,
Culebra, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1994; Released: October 11, 1994

By the Review Board: MARINO (Chairman) and GREENE.

1. The Review Board has before it a Joint Request for Approval of Settlement Agreement filed by Aurio A. Matos (Matos) and Lloyd Santiago-Santos and Lourdes Rodriguez Bonet (Santiago and Rodriguez) on March 8, 1994, and supplemented on July 22, August 15, and August 22, 1994.[1] The Mass Media Bureau filed Comments on April 28 and August 4, 1994, opposing approval of the Settlement Agreement. We shall deny the Joint Request for the reasons set forth below.

2. In an *Initial Decision*, 8 FCC Rcd 7920 (1993) (*I.D.*), Administrative Law Judge Joseph P. Gonzales granted Matos' application based on that applicant's putative comparative superiority.[2] While exceptions to the *I.D.* were pending before the Board, Matos reported on January 28, 1994, that he had recently been informed by the United States Fish and Wildlife Service that he would not be granted a Special Use Permit necessary for effectuating his transmitter site proposal. Also on that date, the Bureau filed a motion seeking issues to determine whether Matos timely reported the loss of his transmitter site and whether he has reasonable assurance of the availability of the site. Matos opposed the motion and has since petitioned to amend to a new site.

3. The Joint Request, as supplemented, contemplates: (1) the grant of the Matos application, as amended; (2) the dismissal of the Santiago and Rodriguez application in return for $50,000, an amount purportedly less than Santiago and Rodriguez' legitimate and prudent expenses incurred in prosecuting their application; and (3) the hiring of Santiago and Rodriguez on the issuance of the construction permit as part-time consultants for two years for $25,000 each, a total of $50,000. Consummation of the Settlement Agreement is contingent upon its approval by the Commission. *See* Jt. Request at 2-3.[3] The Agreement further provides:

> In the event that any provision contained in the Agreement shall for any reason be found to be invalid, illegal or unenforceable ... *the parties will use their best efforts to amend the Agreement* to create a legal, valid and enforceable contract to perform their respective obligations under Agreement.

See Settlement Agreement at ¶ 11 (Emphasis added).

4. The parties have responded to Bureau questions concerning their expenses with sufficient documentation, and no questions therefore remain about the reimbursable expenses under the Settlement Agreement. The existing obstacles to grant of the Joint Request are the consulting agreements with Santiago and Rodriguez, which are essential to the settlement. *See* Supplement to Jt. Request, July 22, 1994, Exh. B. Each agreement provides at ¶ 3:

> Matos agrees to pay [the consultant] the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) per year for each of the two years as compensation for . . . part-time services. Such compensation shall be paid to [the consultant] in monthly installments of One Thousand Forty Dollars ($1,040.00) on the last day of every month during the term of this Agreement. To arrive at the annual salary, monthly payments for the twelfth and twenty-fourth month will be One Thousand Sixty Dollars ($1,060.00). The Parties anticipate that [the consultant] will work approximately Forty (40) hours per month for an hourly salary of Twenty Six Dollars ($26.00) per hour.

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[1] The supplemental information submitted on August 22, 1994 was contained in a pleading styled "Response to Comments of Mass Media Bureau." Earlier, in comments filed on April 28, 1994, the Mass Media Bureau, had argued, *inter alia*, that the original settlement agreement was in draft form, rather than a final document, and thus not grantable. By *Order*, 9 FCC Rcd 3132 (Rev. Bd. 1994), the Board agreed with the Bureau and directed the settling parties to submit all documents supporting their proposed settlement agreement. The supplements have been filed in response to that *Order*, as well as to other challenges noted in subsequent Bureau pleadings.

[2] Subsequently, the Court, in *Bechtel v. FCC*, 10 F. 3d 875 (D.C. Cir. 1993), held that the application of the comparative integration criterion in cases such as this one is unlawful; and the Commission froze the comparative consideration of applications. *See Public Notice* "FCC Freezes Comparative Proceedings," 9 FCC Rcd 1055 (1994), *modified in part*, FCC 94-204, released August 4, 1994.

[3] Consummation of the Agreement is further contingent on the Commission's acceptance of the site amendments and the denial of the Bureau's motion to enlarge issues. In light of our disposition denying the Joint Request, we do not reach either the Bureau's motion to enlarge issues or the amendments concerning the new site, which are opposed by the Bureau for reasons raised in its motion to enlarge.

In addition, within ten days of issuance of the construction permit, Matos must place the first year salary into an escrow account for each consultant. Consulting Agreement ¶ 4. The salary for the second year must be placed in the account a year later.

5. The escrow agreements require the escrow agent to forward the monthly payments directly to Santiago and Rodriguez unless the agent is notified in writing at least three days prior to the payment date by Matos that Santiago and Rodriguez failed to meet their obligations under paragraphs 5 or 7 of the consulting agreements. *See* Supplement to Jt. Request, August 15, 1994, Exhibits A and B (Escrow Agreements) ¶ 2. Those provisions, in turn, prohibit Santiago and Rodriguez from providing consulting services to other radio stations in the market and allow for the termination of the consulting agreements should Santiago and Rodriguez fail to perform their "assigned services" to Matos or provide consulting services elsewhere. Santiago proposes to provide services "relating to the establishment of sales record keeping systems, marketing strategies and promotional strategies" under Matos' direction; Rodriguez will provide services "relating to the establishment of accounting and bookkeeping systems and formulation of cost and revenue projections," also under Matos' direction. Consulting Agreements, at ¶ 2.

6. The Bureau contends that the consulting agreements raise serious questions concerning the *bona fides* of the proposed settlement. It argues initially that the consulting agreements do not "require" Santiago or Rodriguez to furnish any minimum number of hours of work in consideration for their salaries, citing to *Gifford Orion Broadcasting, Ltd.*, 9 FCC Rcd 314, 315, n.4 (Assoc. Gen. Counsel 1993). It further characterizes the description of Santiago and Rodriguez' proposed services as "unreasonabl[y] vague," and challenges Matos' need for Santiago and Rodriguez' services as questionable, inasmuch as Matos is an experienced broadcaster in his own right and has served as the general manager of three radio stations since 1980. *See* Comments on Supplement, August 4, 1994, at 3-4. The Bureau reports: "In sum, [we are] unable to conclude that the consulting arrangement is not a sham to skirt the Commission's limitations on reimbursable expenses." *Id.*, at 4. In reply, the settling parties disagree that there is no minimum number of hours requirement, arguing that the "whereas" clauses of the escrow agreements provide that Santiago and Rodriguez will work 40 hours per month. *See* Response to Comments, August 22, 1994, at 3. They also note that paragraph 7 of the consulting agreements gives Matos the right to terminate the agreements in the event that Santiago or Rodriguez fail to perform their assigned services. *Id.*

DISCUSSION

7. The Commission has emphasized that applicants entering into agreements settling comparative application proceedings may not receive monetary compensation for dismissing their applications in excess of the legitimate and prudent expenses incurred in processing their applications. 47 CFR 73.3525; *see also Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85, 87 ¶ 17 & n.56 (1990), *partial recon. granted on other grounds*, 6 FCC Rcd 2901 (1991). Parties to a settlement must submit any ancillary agreements, including any consulting agreements, and must persuade the agency that any such agreement is *bona fide* rather than a device to elude the compensation limit. *Texas Television, Inc.*, 91 FCC 2d 1043, 1045 (Rev. Bd.), *modified on reconsideration*, 91 FCC 2d 1047 (1982), *rev. denied*, FCC 83-95 (released Mar. 9, 1983); *Venton Corp.*, 90 FCC 2d 307, 314 (1982). In light of the Commission's considerable effort in recent years to keep the comparative hearing process free of egregious applicant abuses, *see generally Gifford Orion Broadcasting, Ltd.*, 8 FCC Rcd 3577, 3579 ¶ 10 (Rev. Bd.), *rev. granted*, 9 FCC Rcd 314 (1993), we must view consulting agreements between former adversaries with a fair degree of skepticism and give them close scrutiny.

8. In reviewing Matos' consulting agreements with Santiago and Rodriguez, which clearly are part of the consideration for the settlement agreement before us, we, like the Bureau, are unable to find that "the [consulting] payment is fair compensation for services actually to be rendered by [the putative consultants], rather than [impermissible] consideration for [the] agreement to dismiss [the] application." *Gifford Orion*, 9 FCC Rcd at 315 n. 6. Nothing within the four corners of the agreements assures us that any consulting services actually will be rendered in exchange for the payments required by the agreements. Payments under the accompanying escrow agreements are automatic, starting shortly after the construction permit is issued, and may be withheld from either putative consultant *only* if Matos notifies the escrow agent in writing that the consultant "has failed to meet [his/her] obligations" by failing to perform "assigned services" or by providing similar services for another station in the market. Supplement to Jt. Request, August 15, 1994, Exhs. A & B, ¶ 2, Escrow Agreements; Supplement to Jt. Request, July 22, 1994, Exh. B, Consulting Agreements ¶ 7. Nowhere in either consulting agreement is there any commitment to a minimum amount of consulting time or any particular results from the consulting arrangement -- or even a commitment by Matos to use the services of Santiago or Rodriguez at all. As we read the Escrow Agreements, if Matos does not ask for service, he cannot withhold payment. The parties have argued that the language of paragraph 3 of each Consulting Agreement, that the parties "*anticipate* that [Santiago and Rodriguez] will work approximately 40 hours per month for an hourly salary of Twenty Six Dollars ($26.00)." (emphasis added) shows their "intent," as do the "whereas" clauses in each Escrow Agreement. Response to Comments of Mass Media Bureau at 3. But, intent and anticipation are not commitments and do not assuage our concerns about the *bona fides* of these consulting agreements; and the language relied on in the Escrow Agreements' whereas clauses merely describes the Consulting Agreements. *Compare Gifford Orion*, 9 FCC Rcd at 315 n.6, accepting a revised consultancy agreement after a provision specifying a maximum number of hours was replaced with one specifying a minimum and maximum number.

9. The Bureau has additionally questioned the vagueness of Santiago's and Rodriguez' services and Matos' need for their services in light of the latter's more extensive broadcast experience, questions also going to the likelihood that Matos will assign Santiago and Rodriguez tasks under the Consulting Agreements. In *Gifford Orion*, a similar question about the need for consulting services was resolved favorably to the settling applicants when they showed that the putative consultant's experience was somewhat different from and thus supplemented the grantee's experience. Here the parties' have not directly responded to these Bureau's concerns nor offered adequate assurance of the *bona fides*

of the arrangement. The parties to a consulting agreement must provide assurance that work will be done and that the compensation will be appropriate for the anticipated work, the consultants' experience, and the time involved. The limited information provided here is not sufficient.[4]

10. In sum, we cannot be assured from the showing here that the $50,000 consulting fee commitment to Santiago and Rodriguez is not an excessive payment for dismissing the Santiago-Rodriguez application in violation of the limit on settlement payments. Thus the Consulting Agreements must be disapproved. The Board's disapproval of the Consulting Agreements is not cured by the severability clause of the Settlement Agreement. Under that provision, the settlement cannot go forward until "the parties [] use their best efforts to amend the Agreement to create a legal, valid and enforceable contract to perform their respective obligations under the Agreement." Joint Request, Settlement Agreement ¶ 11.[5] We cannot approve a settlement contingent on future compliance with § 73.3525. Because the Consulting Agreements are an essential element to the settlement, the settlement must therefore be disapproved.

11. ACCORDINGLY, IT IS ORDERED, That the Joint Request For Approval Of Settlement Agreement, filed on March 8, 1994 and supplemented on July 22 and August 15, 1994, by Aurio A. Matos and Lloyd Santiago-Santos and Lourdes Rodriguez-Bonet IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[4] The wording of the agreements provides less than an enthusiastic endorsement of either Santiago or Rodriguez as a consultant. The Santiago Consulting Agreement provides at page one: "WHEREAS, Santiago *claims* experience in broadcast management, and Matos has agreed to hire Santiago on a part-time basis for a period of two years as an Operations Consultant. (Emphasis added.) The Rodriguez Consulting Agreement provides at page one: "WHEREAS, Rodriguez *claims* experience in accounting and a general business background, and Matos has agreed to hire Rodriguez on a part-time basis for a period of two years as a Business and Financial consultant." (Emphasis added.)

[5] The Settlement Agreement was amended, however, to allow it to go forward even if the Commission approves a lesser sum for expense reimbursement than the parties seek. Response to Comments, August 22, 1994, Exh. A, Amendment to Settlement Agreement ¶ 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY

File No. I-T-C-94-298

Application for authority to acquire and operate additional facilities in the North Pacific Cable (NPC) system

ERRATUM

Released: October 11, 1994

By the Chief, International Facilities Division:

1. The Commission's Order in the above-captioned matter, DA 94-780, released July 22, 1994, is corrected to include Hong Kong, Korea and Singapore as authorized points of communication via the North Pacific Cable system.

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Military Communications Center, Inc. Transferor, and

File No. I-T-C-94-444-TC

LDDS Communications, Inc. Transferee,

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, for authority to transfer control of international resale common carrier.

MEMORANDUM, OPINION AND ORDER

Adopted: September 27, 1994; Released: October 11, 1994

By the Chief, International Facilities Division:

1. On August 22, 1994, Military Communications Center, Inc., ("MCC") and LDDS Communications, Inc. ("LDDS") (collectively "the Applicants") filed the above-captioned application pursuant to Section 214 of the Communications Act of 1934, as amended, and Section 63.01 of the Commission's Rules, requesting authority to transfer control of MCC to LDDS. The application was placed on public notice on August 24, 1994, and no comments were received.

2. MCC, a Delaware corporation, is 50.84% owned by Mr. William O'Reilly, a United States citizen who invests in telecommunications companies.[1] MCC is an international resale common carrier that offers international switched voice and data services through the resale of international switched services of existing carriers. MCC obtains the necessary international transmission capacity from facility-based carriers currently authorized to provide switched voice and data services between the United States and international locations.[2]

3. LDDS, a Georgia corporation, is an international resale and facilities-based common carrier. LDDS is 20.1% owned by Metromedia Company and 11.1% owned by ALLTEL Corporation. Both Metromedia and ALLTEL are United States corporations and holding companies that own a variety of communications interests.[3]

4. The Applicants request authorization to transfer control of MCC to LDDS. LDDS will acquire 100% of MCC's stock, but MCC will continue to exist as a separate operating entity and still maintain the Section 214 authorization.

5. The Applicants state that a grant of this application will serve the public interest because it will promote competition in the international switched voice service market. LDDS will be able to aggregate customers to further stimulate demand, to make more efficient use of existing facilities and to compete more effectively in relevant markets. LDDS will be able to enhance its offerings and become a more effective competitor in the international resale market. This will benefit the public by the introduction of more diverse services, as well as significant operating efficiencies and service quality improvements.

6. In view of the foregoing, we conclude that consent to the transfer of control of MCC's Section 214 authorization from MCC to LDDS will serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Military Communications Center, Inc., and LDDS Communications, Inc., File No. I-T-C-94-444-TC, IS GRANTED and we consent to the transfer of control from MCC to LDDS of the international Section 214 authorization held by MCC, which was originally granted in File No. I-T-C-93-184.

8. IT IS FURTHER ORDERED, pursuant to Section 203 of the Communications Act, as amended, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, that MCC must continue to maintain tariffs for the services authorized in this order.

9. IT IS FURTHER ORDERED that MCC must file annual reports of overseas telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

10. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the Applicants seek to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

11. This order is issued under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.115, may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2), 47 C.F.R. § 1.4(b)(2)).

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[1] *Military Communications Center, Inc.*, File No. I-T-C-93-184, granted pursuant to Public Notice Report No. I-6821, released June 30, 1993.

[2] MCC currently obtains service capacity from AT&T, MCI, or US Sprint or a combination thereof, pursuant to the carrier's applicable tariff: AT&T, F.C.C. Tariff No. 1; MCI, F.C.C. Tariff No. 1; US Sprint, F.C.C. Tariff Nos. 1 and 2. MCC also is authorized to obtain service from other carriers: ALLNET, World Communications, Inc., TRT Communications, Inc., IDB Communications Group, Inc., pursuant to the terms and conditions of the applicable tariff or through a negotiated carrier-to-carrier contract.

[3] MCC and LDDS certify that they do not have an affiliation with a foreign carrier as defined in 47 C.F.R. § 63.01(r).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IDB WORLDCOM SERVICES, INC. — File No. I-T-C-94-440

Application for authority to lease and operate facilities for the provision of direct packet switched data service between the United States and Cuba

ORDER AND AUTHORIZATION

Adopted: September 29, 1994; Released: October 11, 1994

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned application filed by IDB WorldCom Service, Inc. ("IDB") requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the United States and Cuba for the provision of direct packet switched data service. The application was placed on the Commission's public notice and no comments were received.

2. IDB proposes to provide international packet switched data service between the United States and Cuba via the INTELSAT satellite located at 325^0 E.L., using appropriately licensed existing earth station facilities. Specifically, IDB requests authority to lease from Comsat and operate one 4 kHz analog SCPC circuit between an authorized earth station located in the United States and the theoretical midpoint of the INTELSAT AOR satellite connecting with matching facilities provided by INTERTEL S.A. ("INTERTEL") of Cuba. IDB proposes to acquire and operate facilities to connect its operating center in New York, New York, to the U.S. earth station. IDB states that it has already entered into an operating agreement with INTERTEL for the establishment of direct packet data service between the United States and Cuba. Under the terms of its agreement, INTERTEL and IDB have agreed to a 50/50 split of a $5.50 per kilosegment and $5.50 per hour accounting rate for packet data traffic. IDB states this rate is consistent with U.S. policy guidelines.[1] IDB states that it will initiate service within one year.

3. IDB states that the public interest would be served by a grant of its application because it will result in an expanded choice of carriers offering telecommunications service between the United States and Cuba. IDB states such competition will spur innovation and efficiency, lead to lower-priced, higher-quality service, and stimulate customer demand and usage. Further, IDB states that the grant of its application will result in the expansion of direct telecommunications service between the United States and Cuba.

4. In a letter dated July 22, 1993, the U.S. Department of State informed the Commission of the Executive Branch's general policy guidelines for implementation of the telecommunications provisions of the Cuban Democracy Act, which provides that "telecommunication services between the United States and Cuba shall be permitted."[2] Among the policy guidelines are the following requirements: 1) the proposals must have the potential to be operational within a year; 2) settlements must not be more favorable to Cuba than the current 50/50 split of the $1.20 per minute accounting rate; 3) proposals must be limited to equipment and services necessary to deliver a signal to Cuba; 4) proposals must utilize modes of communications already in place between the U.S. and Cuba; and 5) carriers shall report the number of circuits activated by facility on June 30 and December 31 of each year and on the one-year anniversary of the notification by the FCC in the Federal Register.

5. The Commission recently granted the application of Sprint Communications Company, L.P. to provide packet data services between the United States and Cuba pursuant to the same accounting rate as proposed by IDB.[3] In particular, the Commission found that Sprint's application was consistent with the Executive Branch's general guidelines set forth in the Department of State's letter dated July 22, 1993.

6. Upon consideration of IDB's application, we find that a grant of its application will serve the public interest subject to the conditions set forth below. IDB's application is consistent with the Executive Branch's general guidelines set forth in the Department of State's letter. IDB states that it will initiate service within one year, and expects to initiate service shortly after all requisite regulatory approvals have been obtained. IDB's proposed use of INTELSAT facilities and appropriately licensed existing earth station facilities satisfies the requirements that facilities already be in existence and be limited to equipment and services necessary to deliver a signal to Cuba.

7. With respect to IDB's proposed 50/50 split of a $5.50 per kilosegment and $5.50 per hour accounting rate for packet data traffic between the United States and Cuba, the Department of State indicated in a follow-up letter dated May 23, 1994 that it has no objection to our approval so long as the proposed rate does not exceed the 50/50 split of

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[1] In *Sprint Communications, L.P.*, I-T-C-94-238, DA94-636, 9 FCC Rcd 2827 (1994), it was noted that packet data traffic is measured based on a unit known as a "kilosegment." On a typical dial packet data transmission, two kilosegments are transferred per hour. Likewise, on a typical dedicated packet data transmission, four kilosegments are transferred per hour. Therefore, for a typical dial packet data transmission, the total accounting rate would be approximately $16.50 per hour (27.5¢ per minute), including $5.50 for the hour of time and $11.00 for the two kilosegments of transmitted packet data. For a typical dedicated packet data transmission, the total accounting rate would be approximately $27.50 per hour (46¢ per minute), including $5.50 for the hour of time and $22.00 for the four kilosegments of transmitted packet data.

[2] Letter dated July 22, 1993, from Richard C. Beaird, Acting U.S. Coordinator and Director, Bureau of International Communications and Information Policy, U.S. Department of State to Acting FCC Chairman James H. Quello.

[3] *See Sprint Communications Company, L.P.*, 9 FCC Rcd 2827 (1994).

the $1.20 accounting rate required under the guidelines.[4] We find that the proposed accounting rate is within the Department of State's guidelines because both the approximately 27.5¢ per minute accounting rate for a typical dial packet data transmission, and the approximately 46¢ per minute accounting rate for a typical dedicated packet data transmission[5] is well below the $1.20 per minute accounting rate approved for voice services.

8. Accordingly, IT IS ORDERED that application File No. I-T-C-94-440 IS GRANTED and IDB WorldCom Services, Inc. is authorized to:

a. lease from Comsat and operate one 4 kHz analog SCPS circuit between an appropriately licensed existing international earth station located in the United States and the INTELSAT AOR satellite located at 325^0 E.L. connecting with matching facilities furnished by IDB's correspondent in Cuba, INTERTEL S.A. (the international division of EMTELCUBA);

b. acquire and operate necessary earth segment facilities located in the United States;

c. acquire and operate necessary connecting facilities between its operating center in New York and a U.S. earth station; and

d. use the above facilities for the provision of direct packet switched data service between the United States and Cuba subject to the conditions set forth herein.

9. IT IS FURTHER ORDERED that the service authorized herein must be implemented within one year from the date of release of this order.

10. IT IS FURTHER ORDERED that IDB and INTERTEL shall split 50/50 the $5.50 per hour and $5.50 per kilosegment accounting rate for this service.

11. IT IS FURTHER ORDERED that the applicant shall submit reports on or before June 30, and December 31 of each year, and on the one-year anniversary of the notification of the grant of this application in the Federal Register indicating the numbers of circuits activated by facility.

12. IT IS FURTHER ORDERED that this authorization is subject to the applicant's obtaining all necessary licenses and authorizations from the Departments of Treasury and Commerce.

13. IT IS FURTHER ORDERED that this order is subject to revocation without a hearing in the event the Department of State or the Federal Communications Commission determines that the continuation of communications between the United States and Cuba is no longer in the national interest.

14. IT IS FURTHER ORDERED that, pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, IDB shall file and have in effect a tariff for the service authorized in this order before offering services to the public.

15. IT IS FURTHER ORDERED that IDB shall file copies of any operating agreements entered into by itself or its parent/affiliates with its correspondents within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

16. IT IS FURTHER ORDERED that IDB shall file annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

17. IT IS FURTHER ORDERED that IDB shall file a Section 214 application for any additional circuits it proposes to establish between the United States and Cuba.

18. Acceptance of this authorization shall be deemed acceptance of the conditions set forth herein.

19. This authorization is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[4] Letter dated May 23, 1994, from Richard C. Beaird, Acting U.S. Coordinator and Director, Bureau of International Communications and Information Policy, U.S. Department of State to Acting FCC Chairman James H. Quello.

[5] *See supra* note 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Review of Part 73
of the Commission's Rules

ORDER

Adopted: September 30, 1994; Released: October 11, 1994

By the Acting Chief, Mass Media Bureau:

1. The Commission has reviewed 47 CFR Sections 73.4000 through the end of Part 73 which contains instructions on where to find information regarding Commission statements of policy. In order to make this information as accurate and current as possible, the Commission revises and updates these rule sections. This *Order* makes no substantive changes that impose additional burdens or remove provisions relied upon by licensees or the public as the CFR sections affected merely contain information on where Commission statements of policy on various topics can be found. Additionally, we believe that these revisions will serve the public interest by ensuring that the information contained in these CFR sections is current and accurate. This information is amended as part of the Agency's oversight function.

2. These amendments are implemented by authority delegated by the Commission to the Chief, Mass Media Bureau. Because these amendments only update and clarify the existing language of Part 73, prior notice of rule making is not required. 47 CFR Section 1.412(c). For this same reason, these amendments may become effective upon publication in the *Federal Register*. 47 CFR Section 1.427(b). Because a general notice of proposed rule making is not required, the Regulatory Flexibility Act does not apply.

3. Therefore, IT IS ORDERED, That pursuant to Sections 4, 5, and 303, of the Communications Act of 1934, as amended, and Sections 0.61 and 0.283 of the Commission's Rules, Part 73 of the FCC Rules and Regulations IS AMENDED as set forth below, effective upon publication in the *Federal Register*.

4. For further information on this *Order*, call Rita S. McDonald, Policy and Rules Division at (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

Roderick K. Porter
Acting Chief, Mass Media Bureau

APPENDIX

47 CFR Part 73 is amended as follows:

PART 73 -- RADIO BROADCAST SERVICES

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303, 334

2. Section 73.4017 is revised to read as follows:

§ 73.4017 Application processing: Commercial FM stations.

See Report and Order, MM Docket 84-750, FCC 85-125, adopted March 4, 1985. 50 FR 19936, May 13, 1985.

3. Section 73.4050 is amended by revising the last sentence in paragraph (b) and by adding new paragraph (c) to read as follows:

§ 73.4050 Children's TV programs.

* * * * *

(b) *** 96 FCC 2d 634; 49 FR 1704, January 13, 1984.

(c) See Report and Order, MM Dockets 90-570 and 83-670, FCC 91-113, adopted April 9, 1991. 6 FCC Rcd 2111; 56 FR 19611, April 19, 1991; Memorandum Opinion and Order, MM Dockets 90-570 and 83-670, FCC 91-248, adopted August 1, 1991. 6 FCC Rcd 5093; 56 FR 42707, August 29, 1991.

4. Section 73.4107 is amended by revising the last sentence of paragraph (a) and the last sentence of paragraph (b) to read as follows:

§ 73.4107 FM broadcast assignments, Increasing availability of.

(a)*** 100 FCC 2d 1332; 50 FR 3514, January 25, 1994.
(b)*** 101 FCC 2d 630; 50 FR 15558, April 19, 1985.

* * * * *

5. Section 73.4163 is amended by adding a sentence to the end of paragraph (d) and by adding paragraph (e) to read as follows:

§ 73.4163 Noncommercial nature of educational broadcast stations.

* * * * *

(d) * * * Excerpt reprinted at 7 FCC Rcd 827.

(e) See Memorandum Opinion and Order, FCC 90-111, adopted March 28, 1990. 5 FCC Rcd 4920.

6. Section 73.4165 is revised to read as follows:

Section 73.4165 Indecent broadcasts.

(a) See *FCC v. Pacifica Foundation,* 438 U.S. 726, 57 L. Ed 2d 1073, 46 U.S.L.W. 5018 (1978). See also, *Action for Children's Television v. FCC,* 852 F.2d 1332 (D.C. Cir. 1988).

(b) See *Action for Children's Television v. FCC,* [ACT III] 11 F.3d 170 (D.C. Cir. 1993). See also, *Action for Children's Television v. FCC,* [ACT IV] 15 F.3d 186 (D.C. Cir. 1994), rehearing granted, *en banc.*

(c) See Report and Order, GC Docket 92-223, FCC 93-42, adopted January 19, 1993. 8 FCC Rcd 704; 58 FR 5937, January 25, 1993.

(d) See Memorandum Opinion and Order, FCC 93-246, adopted May 11, 1993, 8 FCC Rcd 3600.

(e) See Letter to Rusk Corporation, dated May 6, 1993, FCC 93-229, 8 FCC Rcd 3228.

(f) See Memorandum Opinion and Order, FCC 93-4, adopted January 5, 1993. 8 FCC Rcd 498.

(g) See *Branton v. FCC,* 993 F.2d 906 (D.C. Cir. 1993).

(h) See Memorandum Opinion and Order, DA 91-557, adopted April 30, 1991. 6 FCC Rcd 2560.

7. Section 73.4170 is revised to read as follows:

Section 73.4170 Obscene broadcasts.

(a) See *Miller v. California,* 413 U.S.C. 15 (1973). See also *Pope v. Illinois,* 107 S. Ct. 1918 (1987). 18 U.S.C. § 1464.

(b) See Memorandum Opinion and Order, MM Docket 83-575, FCC 88-4, Adopted January 12, 1988. 3 FCC Rcd 757. See also Memorandum Opinion and Order, MM Docket 83-575, FCC 93-180, Adopted April 2, 1993. 8 FCC Rcd 2753.

(c) See Memorandum Opinion and Order, FCC 87-365, Adopted November 24, 1987. 3 FCC Rcd 930.

(d) See "Memorandum of Understanding between the Federal Communications Commission and the Department of Justice concerning Complaints and Cases Involving Obscenity and Indecency," released April 9, 1991. See also News Release dated April 19, 1991.

8. Section 73.4180 is amended by adding paragraph (c) to read as follows:

§ 73.4180 Payment disclosure: Payola, plugola, kickbacks.

* * * * *

(c) See Public Notice, FCC 88-175, dated May 18, 1988.

9. Section 73.4185 is revised to read as follows:

§ 73.4185 Political broadcasting and telecasting, the law of.

(a) See "The Law of Political Broadcasting and Cablecasting: Political Primer 1984," 100 FCC 2d 1476 (1984).

(b) See Report and Order, MM Docket 91-168, FCC 91-403, adopted December 12, 1991. 7 FCC Rcd 678; 57 FR 189, January 3, 1992; Memorandum Opinion and Order, MM Docket 91-168, FCC 92-210, adopted May 14, 1992. 7 FCC Rcd 4611; 57 FR 27705, June 22, 1992.

10. Section 73.4190 is amended by designating the existing paragraph as paragraph (a) and by adding paragraph (b) to read as follows:

§ 73.4190 Political candidate authorization notice and sponsorship identification.

* * * * *

(b) See Memorandum Opinion and Order, FCC 92-55, adopted February 12, 1992. 7 FCC Rcd 1616.

11. Section 73.4255 is amended by adding a sentence to the end of paragraph (b) to read as follows:

§ 73.4255 Tax certificates: Issuance of.

* * * * *

(b) *** 6 FCC Rcd 6273; 56 FR 64842, December 12, 1991.

12. Section 73.4280 is revised to read as follows:

§ 73.4280 Character evaluation of broadcast applicants.

(a) See Report and Order and Policy Statement, Gen. Docket 81-500, BC Docket 78-108, FCC 85-648, adopted December 10, 1985. 102 FCC 2d 1179; 51 FR 3049, January 23, 1986.

(b) See Policy Statement and Order, FCC 90-195, adopted May 10, 1990. 5 FCC Rcd 3252, 55 FR 23082, June 6, 1990.

(c) See Memorandum Opinion and Order, FCC 91-146, adopted May 1, 1991. 6 FCC Rcd 3448, 56 FR 25633, June 5, 1991.

(d) See Memorandum Opinion and Order, FCC 92-448, adopted September 18, 1992. 7 FCC Rcd 6564, 57 FR 47410, October 16, 1992.

13. Section 73.4267 is amended by designating the existing paragraph as paragraph (a), and by adding paragraphs (b) and (c) to read as follows:

§ 73.4267 Time brokerage.

* * * * *

(b) See Report and Order, MM Docket 91-140, FCC 92-97, adopted March 12, 1992. 7 FCC Rcd 2755; 57 FR 18089, April 29, 1992.

(c) See Memorandum Opinion and Order and Further Notice of Proposed Rule Making, MM Docket 91-140, FCC 92-361, adopted August 5, 1992. 7 FCC Rcd 6387; 57 FR 42701, September 16, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 11, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AMERITECH'S PETITION FOR WAIVER OF COMMISSION'S RULES TO ESTABLISH UNBUNDLED RATE ELEMENTS FOR SS7 SIGNALING

On September 27, 1994, Ameritech petitioned for a waiver of Part 69 of the Commission's rules to establish new unbundled rate elements for the purpose of recovering costs associated with the provision of Signaling System 7 (SS7) signaling message formulation, message switching, and message transport. Ameritech seeks the waiver to establish the additional rate elements that would unbundle charges for SS7 signaling-related services and make available new optional signaling parameters.

Ameritech states that it proposes to introduce separate usage sensitive charges for SS7 message switching, message transfer, and message formulation. Ameritech further proposes new rate elements to implement new service options that would permit SS7 signaling customers to receive additional information in certain of their SS7 messages. Ameritech states that SS7-related costs will be recovered through several bundled and unbundled rates elements. Ameritech states that the SS7 customer connects to its SS7 network via a dedicated network access line (DNAL) which connects to a port at its signal transfer point (STP). Ameritech states that it does not propose to change the current rate structure for DNAL whereby the costs are recouped in flat rated monthly recurring charges.

Ameritech argues that unbundling and separately pricing the different elements of SS7 signaling will allow customers to make economically sound purchasing decisions and will send economically correct signals to potential market entrants.

Interested parties may file comments on this petition for waiver by **November 4, 1994**, and reply comments by **November 21, 1994**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of these filings can be obtained from ITS, Inc. at (202) 857-3800.

We will treat these proceedings as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Contel Corporation, Transferor,	File Nos.42-DSS-TC-94 1556-1576-DSE-TC-94 1557-1580-DSE-TC-94 I-T-C-94-383-TC;
GE American Communications, Inc., Transferee,	CSG-94-164-TC; and 9413319
and	
GTE Spacenet Corporation, Licensee	
For Consent to Transfer Control of GTE Spacenet Corporation	

ORDER AND AUTHORIZATION

Adopted: September 30, 1994; Released: September 30, 1994

By the Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. Contel Corporation (Contel) and GE American Communications, Inc. (GE) have filed the above-captioned applications requesting Commission consent to transfer control of GTE Spacenet Corporation (Spacenet) from Contel to GE.[1] Hughes Communications Galaxy, Inc. (Hughes) filed comments in response and Spacenet and GE filed reply comments. For the reasons discussed below, we grant the applications.

2. The applications state that Spacenet is a wholly-owned subsidiary of Contel which, in turn, is a wholly-owned subsidiary of GTE Corporation (GTE). Spacenet is a licensee and operator of domestic space stations, domestic and international earth stations, and point-to-point microwave facilities. Contel is a holding company and currently votes 100% of the stock of Spacenet. GTE owns and votes 100% of the stock of Contel. The application further states that GE is a Delaware corporation with its principal place of business in Princeton, New Jersey. GE operates a number of satellites including five in-orbit C-band satellites, one hybrid satellite, and three Ku-band satellites, one of which is jointly licensed with Spacenet. GE is a wholly-owned third tier subsidiary of General Electric Capital Services, Inc. which is 100% owned by General Electric Company, a New York corporation with its principal place of business in Schenectady, New York and is engaged in a number of businesses through its affiliated subsidiaries.

3. The transaction proposed involves GE purchasing from Contel all of the issued and outstanding stock of Spacenet using internal GE funds. The applications state that the purchase is contingent on several conditions and that these include grant of all necessary Commission approvals. Under the terms of the Stock Purchase Agreement,[2] Spacenet will continue to conduct business operations and, upon closing, will become a wholly-owned subsidiary of GE.[3] Once the transfer of control is effective, GE will ensure that Spacenet continues to honor all of its then existing contracts and other obligations with respect to licensed facilities.

4. The applicants state that the proposed transaction will serve the public interest in advanced telecommunications and increased competition.[4] It will allow GE to combine the two companies and operate more efficiently. In addition, the applicants state the merger will allow GE to meet demand for satellite delivered services that it has been unable to meet due to lack of transponder capacity in its present system.

II. COMMENTS

5. Hughes states that it has "no objection 'in principle'" to the acquisition. It raises, however, two issues. It requests that GE explain how it will use the orbital positions under its control as a result of the proposed transaction. According to Hughes, the combined companies will have a fleet of sixteen satellites, some of which are nearing the end of their useful lives and GE should be required, in the context of these assignment applications, to clarify its future plans to replace these facilities. In addition, Hughes indicates that GE and GTE did not include a copy of the Stock Purchase Agreement and that failure to do so renders the applications incomplete.

6. In its reply, Spacenet asserts that GE is not required to provide business planning information in the context of this proceeding. According to Spacenet, this information is necessary only when applications for replacements are filed. GE agrees, asserting that no public interest benefits would flow from the disclosure of confidential business

[1] In July of this year, the Commission granted the applications for a pro forma transfer of control of Spacenet from Contel Corporation to Contel Spacenet Corporation to reflect internal corporate restructuring. *See* DS-1438 (July 6, 1994) and Letter from George S. Li, Chief, International Facilities Division to Terri B. Natoli, dated July 13, 1994. On September 26, 1994 the parties filed a minor amendment to the Application for Consent to Transfer Control indicating that the pro forma transfer was completed and that the corporate name of Contel Spacenet Corporation was changed to GTE Transfer Corporation.

[2] The parties explain the transaction by which the transfer will take place and offer to provide copies of the Stock Purchase Agreement at the request of the Commission. *See* Application at Exhibit 2.

[3] GE states that it may decide to merge or consolidate Spacenet operations after the sale and will obtain any necessary Commission authorizations.

[4] Applicants note that for purposes of competitive analysis, the relevant market for domestic satellite services is the domestic interexchange services market. The combined companies represent only approximately one percent of this market, according to the application, and thus no anti-trust problems result. No parties filed comments disputing this assertion. In the Minor Amendment filed on September 26, 1994, the parties note that on September 16, 1994 the Justice Department completed its Hart-Scott-Rodino review of the transaction and that they are in a position to close pending Commission approval.

plans, and that Hughes will have a full opportunity to comment on any future satellite application that GE might file. In addition, Spacenet and GE state that the parties have provided sufficient information about how the proposed transaction will take place[5] and that filing the Stock Purchase Agreement is unnecessary.[6]

III. DISCUSSION

7. The relevant inquiry in evaluating an application for transfer of control of a Commission licensee is whether the transfer will serve the public interest, convenience and necessity.[7] As an initial matter, the Commission must find that the proposed transferee is legally, technically and financially qualified. GE's qualifications as a satellite operator are a matter of record and there has been no evidence presented in this proceeding to the contrary.[8] The second question is whether the public interest will be served by the proposed transfer of control. According to the applicants, the acquisition of Spacenet will enable the combined companies to compete more efficiently and will provide GE with additional capacity which it needs because its satellites are filled. No evidence has been presented in this record to counter these assertions. Therefore, we find that the public interest will be served by grant of these applications.

8. We do not agree that GE must discuss its future plans in the context of this transfer of control. Future use of currently occupied orbital locations will be evaluated when and if GE files applications to replace any of its facilities. Moreover, we do not agree that the parties must file a copy of their Stock Purchase Agreement in order for their applications to be complete. GE and Contel have provided details about how the transaction will take place, as well as the source of the funds to be used to complete it. Hughes has raised no issues that would require the detailed examination of the stock purchase agreement[9] and the application contains sufficient information on which to base a public interest finding under Sections 214 and 310 (d) of the Communications Act. Thus, we will not require additional documentation from the applicants.

IV. CONCLUSION

9. Accordingly, IT IS ORDERED, pursuant to Sections 214 and 310 (d) of the Communications Act, 47 USC §214 and §310 (d), and the Commission's rules on delegated authority, 47 CFR §0.291, that the applications to transfer control of GTE Spacenet Corporation, File Nos. 42-DSS-TC-94, 1556-1576-DSE-TC-94, 1557-1580-DSE-TC-94, I-T-C-94-383-TC, CSG-94-164-TC and 9413319 ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen M. H. Wallman
Chief, Common Carrier Bureau

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[5] Spacenet states that Question 7 on the Form 704 directs the parties to attach an exhibit showing how the transfer will be accomplished. The parties have provided Exhibit 2 which explains how the transfer of control will be accomplished, they have answered Question 6 by identifying the amount of issued and outstanding stock which will convey, and they have indicated in Exhibit 2 that no specific plans have been made for changing the operations of Spacenet after the acquisition. They have also indicated that GE will use internal funds to complete the purchase. Spacenet asserts that this information fully explains the specifics of the transaction.

[6] Citing GTE Spacenet Corporation, 9 FCC Rcd 1271 (1994), Spacenet and GE assert that the Commission has held in the past that such documentation is unnecessary.

[7] 47 USC §310(d) and 47 USC §214. As part of this analysis, we consider the effect the transfer will have on competition and find, in this case, no adverse effect will result because of the relatively small market share, approximately 1% according to the parties, that these combined companies will control. *See* AT&T/ McCaw, ____FCC Rcd____(released September 19, 1994).

[8] *See, e.g.*, GE American Communications, Inc., 3 FCC Rcd 6989 (1989); Application for Joint License of Aurora II Satellite, 7 FCC Rcd 2308 (Common Carrier Bureau 1992); GTE Spacenet Corporation, 9 FCC Rcd 1271 (1994).

[9] *E.g.*, Hughes has not alleged that the transaction is not *bona fide*.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 4, 1994

AMERITECH OPERATING COMPANIES PETITION FOR WAIVER OF SECTION 69.109

Pleading Cycle Established

COMMENTS: October 18, 1994
REPLY COMMENTS: November 1, 1994

On September 19, 1994, the Ameritech Operating Companies (Ameritech) filed a petition for waiver of Section 69.109 of the Commission Rules, 47 C.F.R. § 69.109. Ameritech seeks to establish new rate elements under the Information rate category of Part 69 in order to recover costs associated with providing interexchange carriers with call completion service for directory assistance calls. Ameritech also requests waiver authority to establish additional rate elements or to change the rate structure in the event Ameritech changes the manner in which service is provided. Ameritech states that granting this waiver will serve the public interest by establishing a reasonable relationship between the cost of providing call completion service and the method used to recover those costs, as well as provide end users with the ease and convenience of completing two telephone calls with one call.

Interested parties may file comments on this petition for waiver no later than **October 18, 1994**. Replies should be filed by **November 1, 1994**.

An original and four copies of all comments and replies must be filed in accordance with Section 1.51(c) of the Commission's Rules, 47 C.F.R. § 1.51(c). In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 2100 M Street, N.W., Suite 140, Washington, D.C. 20037 and one copy with the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

For further information, contact Wanda M. Harris, Tariff Division, Common Carrier Bureau, (202) 418-1530.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request for
Declaratory Ruling of

NATIONAL ASSOCIATION OF
BROADCASTERS

Regarding Section 312(a)(7)
of the Communications Act

MEMORANDUM OPINION AND ORDER

Adopted: August 31, 1994; Released: October 3, 1994

By the Commission:

1. The Commission has before it a request filed on August 18, 1992, by the National Association of Broadcasters ("NAB") seeking a declaratory ruling that broadcast stations need not provide legally qualified candidates for federal office with program time in increments other than those which the station ordinarily sells to commercial advertisers or which it ordinarily programs. In the alternative, NAB asks for a ruling that stations need not sell such time during programming not produced by the station itself (e.g., programming produced by networks and syndicators).[1] In order to establish a fuller record and particularly to afford interested parties an opportunity to participate, on October 23, 1992, the Commission sought public comment on the issues raised by these filings.[2]

2. The Commission also ruled that in the interim period until resolution of this request, licensees should continue to rely on the Commission's guidelines for responding to reasonable access requests first articulated in the *Commission Policy in Enforcing Section 312(a)(7) of the Communications Act* (*"1978 Policy Statement"*).[3] In addition, the Commission stated that such guidelines "do not mean that broadcasters will be required to provide five minutes or other non-standard lengths of program time to candidates in any particular instance."[4]

The Request for Declaratory Ruling

3. NAB argues that the *1978 Policy Statement* prohibited broadcasters from establishing bans on the lengths of advertising time made available to commercial advertisers, but did not require the sale of every conceivable length of time desired by a candidate. NAB argues further that the fundamental intent of the Commission in the *1978 Policy Statement* is to provide federal candidates with access to the various classes and lengths of time a station actually sells to commercial advertisers. NAB thus urges the Commission to infer from the *1978 Policy Statement* that stations need not sell time to candidates in increments which the stations neither sell to commercial advertisers nor program themselves.

Comments

4. The majority of commenters support NAB's request and recommend that the Commission not promulgate specific rules mandating that broadcast stations must provide legally qualified candidates for federal office with program time in increments other than those which the station ordinarily sells to commercial advertisers or which it ordinarily programs. These commenters suggest that longstanding Commission precedent prohibits flat bans only in connection with the lengths of time it has made available to commercial advertisers. Many commenters believe that unless a station has made odd program lengths available to commercial advertisers or has chosen to program particular odd lengths such rules would place a substantial burden on broadcasters for two essential reasons: (1) stations could face severe technological burdens because of the difficulty of delaying programming to accommodate political advertisements of nonstandard lengths; and (2) because of contractual obligations with both syndicators and networks, a station may not have five-minute, or other odd length periods of time to offer a client.[5]

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[1] On September 17, 1992, the Democratic National Committee ("DNC") filed a letter urging the Commission to defer action on the NAB request until presented with an actual case or controversy. On October 9, 1992, People for the American Way and Media Access Project (PAW/MAP) filed an opposition to NAB's request for declaratory ruling, arguing that grant of this request would require reversal of the Commission's longstanding and consistent interpretation of Section 312(a)(7), which requires that candidates' requests be considered individually, on a case-by-case basis. On January 14, 1993, PAW/MAP asked that its opposition be considered as comments in this proceeding.

[2] *Staff Ruling and Request for Public Comment*, 7 FCC Rcd 6880 (1992). Comments were due by January 23, 1993, and reply comments were due by March 1, 1993. A complete list of the commenting parties is listed in the Appendix.

[3] 68 FCC 2d 1079 (1978). The guidelines a licensee must follow in evaluating access requests are well-established:

> [A]ccess requests from "legally qualified" candidates for federal elective office... must be considered on an individualized basis, and broadcasters are required to tailor their responses to accommodate, as much as reasonably possible, a candidate's stated purposes in seeking air time. In responding to access requests, however, broadcasters may also give weight to such factors as the amount of time previously sold to the candidate, the disruptive impact on regular programming, and the likelihood of requests for time by rival candidates under the equal opportunities provision of Section 315(a).

CBS Inc. v. FCC, 453 U.S. 367, 387 (1981) (*"Carter-Mondale"*).

[4] 7 FCC Rcd at 6881.

[5] A.H. Belo Corporation, Cosmos Broadcasting Corporation, Cox Enterprises, Inc. and Multimedia as joint parties also cite to the *1978 Policy Statement*, saying that Section 312(a)(7) requires stations to follow their normal commercial practices in granting access to federal candidates. CBS states that sales of odd-length program time to political candidates would "fractionalize" the station's programming. GHTV, SCI Television, and Busse Corporation as joint parties state that altering commercial and program time in newscasts to accommodate political advertising

5. In contrast, reply comments submitted by the Media Access Project/People for the American Way (MAP/PAW) point to Commission and court decisions which, it contends, hold that a broadcaster cannot arbitrarily refuse to sell an ad of a certain length. They agree, however, that the Commission should not require a broadcaster to sell odd blocks of time to candidates in every circumstance, particularly where the request does not come sufficiently far enough in advance of the requested programming date. MAP/PAW argues that permitting licensees to choose whether or not to sell odd-length program time would conflict with the Commission's longstanding interpretation of Section 312(a)(7), which requires that requests for access by federal candidates must be considered individually on a case-by-case basis thereby prohibiting a blanket policy on sales of any particular length of time.

Discussion

6. Section 312(a)(7) of the Communications Act provides:

> The Commission may revoke any station license or construction permit... for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.[6]

The Commission has not established formal rules outlining specifically how much time would satisfy this requirement. Instead, it has relied on the reasonable good faith judgment of licensees to provide time to federal candidates.[7] In determining whether a particular licensee's judgment in affording access to advertising time is reasonable, the Commission has essentially confined itself to two questions: (1) Did the broadcaster follow the proper standards in deciding whether to grant a candidate's request for access?; and (2) Is the broadcaster's explanation of his decision reasonable in terms of these standards?[8]

7. When the Commission formulated its policies for implementing the reasonable access provision in the *1978 Policy Statement*, it stated:

> We believe it to be generally unreasonable for a licensee to follow a policy of flatly banning access by a federal candidate to any of the classes and lengths of program or spot time in the same periods which the station offers to commercial advertisers.[9]

The Commission elaborated that:

> We do not believe that this policy will in any way disrupt a station's broadcast schedule. It only requires that the licensee follow its usual commercial practices.[10]

Finally, in summarizing the various policies it had established, the Commission stated that "[l]icensees may not adopt a policy that flatly bans federal candidates from access to the types, lengths, and classes of time which they sell to commercial advertisers."[11]

8. In the 1991 political programming *Report and Order*,[12] the Commission emphasized the continued viability of the reasonable access guidelines in the *1978 Policy Statement*. Indeed, in the *Report and Order's* consideration of whether federal candidates were entitled to gain access to a broadcast facility during the weekend prior to an election to edit existing advertising or to purchase additional time, the Commission decided that such access was required only to the extent weekend access had been made available to commercial advertisers during the preceding year.[13] The Commission stated that:

> We confirm that stations are required only to apply the same policies to candidates with respect to weekend access that they apply to commercial advertisers. As noted above, we believe that it is reasonable for federal candidates to expect to be treated in the same manner as commercial advertisers.[14]

9. Similarly, with respect to "make goods," the Commission determined that broadcasters do not have to offer time-sensitive make goods to any candidate unless such a privilege had been offered to commercial advertisers during the prior year in connection with the purchase of the same class of time.[15] Although the issue of make goods involved the "lowest unit charge" provision (Section 315(b)) of the Act and not Section 312(a)(7), it has implications for reasonable access in that the Commission decided that no candidates (federal, state or local) are entitled to time-sensitive make goods unless such an arrangement has been made available to commercial advertisers in the prior year.

10. Thus, in two contexts the Commission related specific requirements for providing access to candidates to the station's actual practices in its dealings with commercial advertisers. This is fully consistent with the reasoning in the *1978 Policy Statement* that *only* limitations or flat bans of the kinds and lengths of time *offered to commercial advertisers* are prohibited. We believe that the same rationale applies to NAB's request and that accordingly broadcasters should be required to make available to federal candidates only the lengths of time offered to commercial

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disserves the public interest and could cause confusion among viewers who may not differentiate between political advertisements and the newscast.

[6] 47 U.S.C. Section 312(a)(7).

[7] *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 681.

[8] *Carter-Mondale* at 375-76.

[9] 68 FCC 2d. at 1090.

[10] *Id.*

[11] *Id.* at 1094.

[12] *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678 (1991); *Recon . denied*, 7 FCC Rcd 4611 (1992).

[13] 7 FCC Rcd at 683.

[14] 7 FCC Rcd at 4612. The Commission codified the weekend access policy in the reasonable access rules, Section 73.1944(b).

[15] 7 FCC Rcd at 697.

advertisers during the year preceding a particular election period. We also believe that stations must make program time available to federal candidates in the same lengths they have programmed the station in the year preceding an election whether or not such lengths of programming time have been sold to commercial advertisers. A station's decision to program odd lengths of time should be treated in the same manner as its decision to sell odd lengths of time. In both cases, it is reasonable to require broadcasters to provide access to qualified federal candidates consistent with their own sales and programming decisions. By establishing the relevant period as one year prior to the election, the Commission is assuring that federal candidates are provided access consistent with a station's current commercial sales or programming practices. It also protects the candidate from the occasional abuse that might occur if a station changed its sales practices or programming just prior to an election period.

11. We believe that this is an appropriate interpretation of the reasonable access provision despite an apparent inconsistency with the language in one decision rendered after the *1978 Policy Statement*. In *Ed Noble for U.S. Senate Committee*,[16] the then Broadcast Bureau held that a station's decision not to sell a candidate five-minute program time during prime time was reasonable given the last-minute nature of the request, the potential disruption that would be caused by equal opportunities requests by opposing parties, and the station's other efforts to accommodate the candidate. However, as NAB notes, although the station did not sell five-minute program time to commercial advertisers, Bureau "dicta" in Ed Noble indicated that if a candidate in a similar situation requests five-minute program time far enough in advance, network affiliates, for example, may have to preempt one-half hour of network time, air the candidate's five-minute program, and fill the remaining time with local programming or other candidates' programming. We agree with NAB that the dicta in Ed Noble is in conflict with the explicit statements made by the full Commission in the 1978 Policy Statement, which relate the reasonable access requirements to a station's particular practices. Therefore, to the extent that Ed Noble may suggest a result contrary to our determination herein, it is superseded by this ruling.

12. Finally, with respect to MAP/PAW's argument discussed in ¶ 5, *supra*, that the issue of odd lengths of time should be handled on a case-by-case basis, we believe that it is preferable and appropriate to resolve this important issue by declaratory ruling rather than leaving its resolution to case-by-case determinations. The ruling clarifies our reasonable access policies for candidates and broadcasters in a manner which comports with longstanding Commission precedent. Furthermore, taking this action should help to prevent disputes between stations and candidates in the heat of election campaigns, and correspondingly to lessen our case load by providing more specific guidance to interested parties.

13. In view of the forgoing, NAB's August 18, 1992, request for declaratory ruling to the extent indicated, IS GRANTED.[17]

[16] 79 FCC 2d 903 (B/C Bur. 1980).

[17] In view of our decision herein, NAB's alternative request discussed in ¶ 1, *supra*, regarding network and syndicated programming is moot.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton,
Acting Secretary

APPENDIX

FORMAL COMMENTS

CBS Inc.

Haley, Bader, and Potts

Hearst Corporation

Joint Comments of A.H. Belo Corporation, Cosmos Broadcasting, Cox Enterprises, and Multimedia, Inc.

Joint Comments of Busse Broadcasting Corporation, GHTV, Inc., and SCI Television, Inc.

National Association of Broadcasters

People for the American Way and Media Access Project

REPLY COMMENTS

Haley, Bader, and Potts

People for the American Way and Media Access Project

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ROCKTON SCHOOL DISTRICT #140
Rockford, Illinois — FILE NO. BPLIF-920817DB

ROCKFORD COLLEGE
Rockford, Illinois — FILE NO. BPLIF-920507DH

For Construction Permit and License in the Instructional Television Fixed Service on Channels C1-C4

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 1994; Released: October 12, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Rockton School District #140 (Rockton) and Rockford College (College), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels C1-C4 in the Rockford, Illinois area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Rockton is a school district that is accredited by the Illinois State Board of Education and that is applying to serve students enrolled at schools within its jurisdiction. College is accredited by the Commission on Institutions of Higher Education of North Central Association and is applying to serve students on its campus and in neighboring areas.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels in the same area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate to another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism: Rockton is entitled to four points for being a school district that proposes to serve the formal educational needs of schools within its jurisdiction. College is also entitled to four points because its proposed facilities will be located in and serve the area in which it is located.

Accreditation. Each applicant is entitled to three points under this comparative criterion. Rockton is accredited by the Illinois State Board of Education, whereas College is accredited by the Commission on Institutions of Higher Education of North Central Association.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we will consider as

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Rockton's illustrative schedule and grid both propose an average of 41 hours of ITFS programming per channel per week, all of which is to be formal educational programming. However, Rockton's has entered into a lease agreement which only allows for 40 hours of such programming. Consequently, Rockton is entitled to only one programming merit point. In its illustrative schedule, College proposes 25.375 hours of programming per channel per week, of which 9.25 hours is formal educational programming. In contrast, College's grid proposes an average of 41 hours of ITFS programming per channel per week, of which 16.5 hours is formal educational programming. Thus, College is deemed to have proposed an average of 9.25 hours of formal educational ITFS programming per channel per week and is entitled to no programming merit points.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Rockton is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational ITFS programming per channel per week, for a total of ten points. College is entitled to four points for being local, three points for being accredited and two points for observing the four-channel limitation, for a total of nine points. Thus, the tentative selectee is Rockton.

OTHER MATTERS

5. Rockton proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Wireless Cable, Inc., which conforms in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against Rockton's application.

6. We find Rockton fully qualified to be an ITFS licensee and conclude that grant of Rockton's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Rockford College (BPLIF-920507DH) IS DENIED, and the application of Rockton School District #140 (BPLIF-920817DB) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BROKEN ARROW PUBLIC SCHOOL DISTRICT #3
Tulsa, Oklahoma — FILE NO. BPLIF-920420DB

SHEKINAH NETWORK
Tulsa, Oklahoma — FILE NO. BPLIF-920527DB

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels C1-C4

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 1994; Released: October 12, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Broken Arrow Public School District #3 (Broken Arrow) and Shekinah Network (Shekinah), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels C1-C4 in the Tulsa, Oklahoma area.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Broken Arrow is a school district that is accredited by the Oklahoma Department of Education and that is applying to serve students enrolled at schools within its jurisdiction. While Shekinah is not itself local to the Tulsa area and is not itself accredited, it has submitted the requisite letters of intended use from accredited schools that will use its service and has documented the establishment of a local programming committee in the community.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels in the same area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth one point is awarded to applicants which are existing E or F channel licensees seeking to relocate to another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Broken Arrow is entitled to four points because it is a school district that proposes to serve the formal educational needs of students at schools within its jurisdiction. Shekinah, based in Atascadero, California, seeks to serve the Tulsa, Oklahoma area. Because its headquarters is not located within the area it proposes to serve, Shekinah is not entitled to points for being a local applicant.

Accreditation. Broken Arrow is entitled to three points because it is accredited by the Oklahoma State Department of Education. Although Shekinah proposes to serve accredited institutions, a factor which satisfied its basic eligibility, it is not an accredited entity in its own right in the area it proposes to serve, the factor necessary for earning merit points under the accreditation criterion. Therefore, Shekinah is not entitled to any points by this measure. See *Instructional Television Fixed Service - Second*

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

Report and Order Reconsidered in MM Docket No. 83-523, 59 RR 2d 1355, 1370 (1986); and *Northern Arizona University Foundation*, 9 FCC Rcd 1549 (1994).

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Broken Arrow's illustrative schedule and grid propose an average of 41 hours of ITFS programming per channel per week, 12.25 hours per channel per week of which is formal educational programming. Consequently, Broken Arrow is entitled to one programming merit point. In contrast, Shekinah's illustrative schedule and grid propose an average of 25 hours of ITFS programming per channel per week, 21.875 hours per channel per week of which is formal educational programming. Thus, Shekinah is also entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Broken Arrow is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 41 hours of ITFS programming per channel per week, for a total of ten points. Shekinah is entitled to two points for observing the four-channel limitation and one point for proposing at least 21 hours of formal educational ITFS programming per channel per week, for a total of three points. Thus, the tentative selectee is Broken Arrow.

OTHER MATTERS

5. Broken Arrow proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with United States Wireless Cable, Inc., which conforms in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against Broken Arrow's application.

6. We find Broken Arrow fully qualified to be an ITFS licensee and conclude that grant of Broken Arrow's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Shekinah Network (BPLIF-920527DB) IS DENIED, and the application of Broken Arrow Public School District #3 (BPLIF-920420DB) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

WOR-WIC COMMUNITY COLLEGE — FILE NO. BPLIF-930219EJ
Salisbury, Maryland

SUSSEX COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT — FILE NO. BPLIF-930319DB
Delmar, Delaware

For Construction Permit and License in the Instructional Television Fixed Service on Channels C1-C4

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 1994; Released: October 12, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Wor-Wic Community College (Wor-Wic) and Sussex County Vocational Technical School District (Sussex), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels C1-C4 in the areas of Salisbury, Maryland and Delmar, Delaware, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. Wor-Wic, an educational institution engaged in the formal education of students, proposes to serve students on its campus and in neighboring areas. Sussex is a school district that proposes to serve the educational needs of students enrolled in schools both within and outside its jurisdiction. Both applicants are accredited by the Middle States Association of Colleges and Schools.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels in the same area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate to another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Wor-Wic is entitled to four points because its proposed facilities will be located in and serve the area in which it is located. Sussex is also entitled to four points for being a school district that proposes to serve the formal educational needs of schools within its jurisdiction.

Accreditation. Both applicants are entitled to three points for being accredited by the Middle States Association of Colleges and Schools.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." The illustrative schedules and program grids of both Wor-Wic and Sussex propose an average of 24.375 hours of ITFS programming per channel per week, all of which is to be

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or at least 41 hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

formal educational programming. Consequently, Wor-Wic and Sussex are entitled to one programming merit point each.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Both applicants are entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational ITFS programming per channel per week, for a total of ten points. Because the applicants are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service - Third Report and Order in MM Docket No. 83-523, (Third Report and Order)*, 4 FCC Rcd 4830 (1989); *Third Report and Order Reconsidered*, 5 FCC Rcd 945 (1990); and 47 C.F.R. Section 74.913(d). This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[3] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the expired figures to determine if any applicant's system reaches less than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. Wor-Wic submitted properly executed letters of intended use from Salisbury State University, the University of Maryland Eastern Shore, and the Wicomico County Board of Education, prior to the "B" cut-off date, which, in this case is June 11, 1993. Discounting the student enrollment figures for other receive sites for which the required documentation has not been provided, Wor-Wic will be credited with 24,425 students. Sussex has submitted a letter indicating that 6,403 students will be served at its receive sites, but the necessary receive site letters from schools beyond its jurisdiction were not submitted prior to the June 11th "B" cut-off date. With respect to Sussex, it appears that Sussex Technical High School is the only receive site under the applicant's jurisdiction. Accordingly, we will credit Sussex with only 1,000 students, the number enrolled at Sussex Technical High School. Because the number of students credited to Sussex, 1,000, is less than 80 percent of the number of students credited to Wor-Wic, 24,425, Wor-Wic will be authorized to operate facilities on Channels C1-C4 and the application of Sussex will be denied.

OTHER MATTERS

7. Wor-Wic proposes to lease excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Salisbury E MPSG Partnership, which conforms in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against Wor-Wic's application.

8. We find Wor-Wic fully qualified to be an ITFS licensee and conclude that grant of Wor-Wic's application would serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the application of Sussex County Vocational Technical School District (BPLIF-930319DB) IS DENIED, and the application of Wor-Wic Community College (BPLIF-930219EJ) IS GRANTED.

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] Only receive sites specified as of the "B" cut-off date may be used in determining the number of students served. *Third Report and Order Recon., supra.* Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. Section 74.911(c); *Third Report and Order*, 4 FCC Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and an indication of the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. Section 74.932, Note 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Mountain Broadcasting Corporation against Matamoras Video Cable Co., Cable T.V. of Tri-States, Inc., and Montague Cable Co. CSR-4216-M

Request for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: September 29, 1994; Released: October 12, 1994

By the Chief, Cable Services Bureau:

1. On February 10, 1994, a petition on behalf of Mountain Broadcasting Corporation, licensee of Station WMBC-TV (Ind., Ch. 63) Newton, New Jersey, was filed with the Commission claiming that Matamoras Video Cable Co.; Cable T.V. of Tri-States, Inc.; and Montague Cable Co. (collectively "Matamoras") operator of systems serving various communities in Pennsylvania, New York, and New Jersey[1] had declined to carry the station.[2] Station WMBC-TV asserts that they declined to carry it even though it is a "local" signal within the meaning of §4 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), in the New York ADI, where the above cable systems are located. No opposition to Station WMBC-TV's petition has been filed.

2. Although no formal opposition was filed, in a letter dated March 1, 1994, Matamoras informed the Commission of its intent to carry Station WMBC-TV on its channel line-up by June of 1994. To date, it has failed to do so.

3. Station WMBC-TV's petition establishes that it is entitled to carriage on the Matamoras cable systems and it has requested carriage on the systems as it is permitted to do under §4 of the 1992 Cable Act. Since no other pleadings have been filed in this matter, the Complaint filed February 10, 1994, by Mountain Broadcasting Corporation is GRANTED in accordance with §614(c) (47 U.S.C. 534(c)) of the Communications Act of 1934, as amended, and Matamoras Video Cable Co. IS ORDERED to commence carriage of Station WMBC-TV forty-five (45) days from the release date of this *ORDER*. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

[1] Matamoras Video Cable Co serves the communities of Matamoras, and Westfall, Pennsylvania; Cable T.V. of Tri-State serves Unionville, and Minisink New York; and Montague Cable Co. serves Montague, New Jersey.

[2] The three cable systems are apparently under common ownership and control.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Moran Communications, Inc. against Adelphia Cable Communications	CSR-4152-M VA0043
	CSR--4154-M VA0110

Requests for Carriage

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 1994; Released: October 12, 1994

By the Chief, Cable Services Bureau:

1. On November 5, 1993, petitions on behalf of Moran Communications, Inc. ("Moran"), licensee of low power television Station W20AT (Channel 20), Roanoke Rapids, North Carolina, were filed with the Commission claiming that Adelphia Cable Communications ("Adelphia"), operator of cable television systems serving Emporia and South Hill, Virginia, had declined to carry the station, even though W20AT is a fully-qualified low power television station within the meaning of §76.56(b)(3) of the Commission's Rules and §§614(c) and (h)(2) of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). Adelphia filed oppositions to these petitions on December 9, 1993 to which Moran responded.

2. In support of its petitions, Moran argues that W20AT: 1) operates 168 hours per week, well over the 24 hours per week minimum; 2) is located only 17.24 miles from Emporia's principal headend and only 25.17 miles from South Hill's principal headend; 3) is in full compliance with Part 73 of the Commission's rules governing children's programming, political broadcasting, interference and Equal Employment Opportunity; 4) Roanoke Rapids, its community-of-license, has a population of 15,722 and is not located within the 160 largest metropolitan statistical areas; 5) provides locally-originated programming which addresses the news and informational needs of the community; and 6) there are no full power television stations licensed to serve either Greenville County or Mecklenburg County, the counties served by Adelphia Cable. Moran states that it notified Adelphia of its obligation to carry W20AT on both systems on May 28, 1993. While Adelphia refused carriage on June 14, 1993, for its Emporia system, citing W20AT's poor signal quality as its reason, Moran states that it received no response regarding the South Hill system. However, learning informally that Adelphia was also claiming poor signal quality for the South Hill system, Moran subsequently purchased and installed new reception equipment at both of Adelphia's principal headends to correct any signal deficiencies. It requested carriage a second time for both systems on September 29, 1993. Around the same time, Moran indicates that it also granted Adelphia unconditional retransmission consent with regard to its station.[1] Adelphia formally refused carriage a second time for both systems on October 13, 1993, claiming that W20AT had waived its claim to must carry status and that there were unresolved issues involving signal strength[2] and copyright. Moran refutes these claims, however, and it requests that the Commission order Adelphia to carry its station, particularly as it is the only local commercial station that serves the residents of Roanoke Valley.

3. In its oppositions, Adelphia states that since Moran opted to elect retransmission consent, it is not entitled to must-carry status and cannot request an order to require the carriage of its station. Moreover, Adelphia argues that Moran would have waived its must-carry rights in any event by not timely responding to Adelphia's June 14, 1993 notification[3] and by not filing its petition with the Commission in a timely manner. Further, Adelphia maintains that it has no available channel capacity on either system to add W20AT and that requiring it to do so would disrupt currently-carried programming by forcing it to breach a contractual agreement with either a non-must carry station or a satellite cable programming service.[4] Adelphia therefore requests that Moran's petitions be denied.

4. Moran emphasizes in reply that it meets all the qualifications of a low power television station entitled to must-carry status. Despite this fact, however, and the fact that Adelphia's original signal quality objections have been resolved, the systems continue to refuse carriage and raise new objections in justification. These new objections should be rejected, maintains Moran, as either incorrect or unproven. First, Moran states that its petitions were timely filed from the September 29, 1993 date of its latest demands for carriage from Adelphia. Indeed, Moran points out, Adelphia itself never responded to that request within the 30 days required by §614(d)(1) of the Communications Act of 1934, as amended. In addition, Moran avers that it has not waived any of its must-carry rights since it first requested carriage on May 28, 1993. Its subsequent grant of retransmission consent, contends Moran, was merely its attempt to follow the Commission's procedures with regard to low power television stations which indicate that "carriage of a low-power television station can be voluntary [i.e. retransmission consent], or it can be subject to Commission *Order* under the Commission's must-carry rules." *See Report and Order in MM Docket No. 92-259*, 8 FCC Rcd 2965, 1998 (1993) at paragraph 140. Finally, Moran

[1] Moran states that it granted this consent in letters dated September 10 and 30, 1993.

[2] Moran states that Adelphia has provided no signal strength surveys to support this claim.

[3] Adelphia claims that it did provide Moran written notification on June 14, 1993, of its refusal to carry W20AT on its South Hill system. However, the exhibit it points to, which was included in Moran's petition, does not confirm this fact.

[4] Adelphia states that both system have a 31 channel capacity and that all are currently occupied: 9 channels of the Emporia system and 10 of the South Hill system carry television broadcast stations with either must-carry status or retransmission consent agreements and the rest are satellite cable programming services.

argues that no particulars with regard to Adelphia's contractual obligations have been submitted for review and are, in any case, irrelevant as they are superseded by the obligations imposed by the 1992 Cable Act.

5. We are not persuaded by the arguments raised by Adelphia. Section 614(a) of the Communications Act of 1934, as amended, requires the carriage of "qualified" low power television (LPTV) stations in certain limited circumstances. *See* 47 U.S.C. §534(a). An LPTV station that conforms to the rules established for LPTV in stations in Part 74 of the Commission's Rules will be considered "qualified" only if: 1) it broadcasts for at least the minimum number of hours of operation required under 47 C.F.R. Part 73; 2) it adheres to Commission requirements regarding nonentertainment programming and employment practices; 3) it complies with interference regulations consistent with its secondary status; 4) it is located no more than 35 miles from the cable system's headend and delivers to the principal headend an over-the-air signal of good quality; 5) the community of license of the station and the franchise area of the cable system are both located outside the largest 160 Metropolitan Statistical Areas (MSA's) on June 30, 1990, and the population of such community of license on that date did not exceed 35,000; and 6) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system. *See* 47 U.S.C. §534(h)(2); 47 C.F.R. §76.55(d). The record before us establishes that Moran's low power station meets these requirements. Moreover, it has corrected its initial signal quality deficiencies, a fact which has not been disputed by Adelphia.

6. Further, from the facts before us, we conclude that it was Moran's intention to elect must-carry rights over that of retransmission consent and that it did so on May 28, 1993, well before its subsequent September 10, 1993 grant of retransmission consent. As this was Moran's first choice, we emphasize that it must retain this election for the full period required by §76.64(f) of the Commission's Rules. *See Report and Order, supra,* at paragraph 150. We wish to point out, however, that Moran's stated reasons for granting a follow-up retransmission consent to Adelphia are in error. Paragraph 140 of the *Report and Order, supra,* states that ". . . we find that multichannel distributors may not retransmit the signals of low power television (LPTV) stations without the stations' consent. In other words, LPTV stations have retransmission consent rights. LPTV stations *are, in fact, television broadcast stations,* and the 1992 Act affords them limited must-carry rights. Hence, we conclude that LPTV stations cannot be retransmitted without consent, *unless they are carried pursuant to must-carry status (emphasis added).* " This language does not, as Moran suggests, require that low power stations elect both alternatives for an either/or situation since they achieve must-carry status only under certain conditions. Rather, low power television stations, just like full-power commercial television stations, are required to elect either retransmission consent or must-carry status, but not both. Further, we find Moran's petitions to be timely filed pursuant to §76.7(c)(4)(iii) of the Commission's Rules as they were filed within 60 days of the station's September 29, 1993 formal requests for carriage subsequent to correcting signal quality problems. Finally, as stated at paragraph 26 of the *Report and Order, supra,* "A cable system with more than 12 usable activated channels, regardless of the number of subscribers, must carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.[footnote omitted] The carriage of other broadcast television signals is at the discretion of the cable operator, subject to retransmission consent. . ." *See* §614(b)(1)(B) of the 1992 Cable Act. Adelphia has not established that it currently has reached the channel capacity cap for must-carry stations. The carriage of W20AT on Adelphia's South Hill and Emporia systems, therefore, would take precedence over that of any non-must carry or satellite-delivered stations.

7. We find that W20AT is a qualified low power television station and that it is entitled to carriage on the Emporia and South Hill, Virginia cable systems. Accordingly, the complaints filed November 5, 1993, by Moran Communications ARE GRANTED pursuant to §614(c) (47 U.S.C. §534(c)) of the Communications Act of 1934, as amended, and Adelphia Cable Communications IS ORDERED to commence carriage of low power television Station W20AT on both systems forty-five (45) days from the release date of this Order. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by §0.321 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

Complaint of Lightning Broadcasting Company against Capital Cable Partners — CSR-4057-M

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 1994; Released: October 12, 1994

By the Chief, Cable Services Bureau:

1. On July 22, 1994, a petition for reconsideration was filed, on behalf of Capital Cable Partners ("Capital"), operator of a cable systems serving Vandalia, Brownstown and Ramsey, Illinois. Capital requests that the Commission reconsider its May 11, 1994 action[1] ordering Capital to carry low power station W41BL (Channel 41), Effingham, Illinois on its systems serving Vandalia, Brownstown and Ramsey, Illinois. No opposition to this petition has been received.

2. In support of this request, Capital submits engineering data consisting of four signal level readings taken over a 2-hour period on July 19, 1994 at the principal headend of each system. This data demonstrates, consistent with Commission requirements, that W41BL's signal strength for Capital's Vandalia, Brownstown and Ramesy systems is substantially below the level of -45 dBm required for UHF stations.

3. Staff review of the undisputed engineering data submitted by Capital confirms its contention that W41BL's signal quality at the system's designated headend is not sufficient to entitle the station to mandatory carriage on Capital's cable system serving Vandalia, Brownstown and Ramsey, Illinois. *See* 47 U.S.C. §535(g)(4). Accordingly, the petition for reconsideration, filed July 22, 1994, on behalf of Capital Cable Partners IS GRANTED, and our Order adopted May 11, 1994, IS RESCINDED, pursuant to authority delegated in §§0.321 and 1.106 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] *Lightning Broadcasting Company against Capital Cable Partners*, 9 FCC Rcd 2315 (1994).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 94-107

In the Matter of

Petition on Behalf of Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction over Commercial Mobile Radio Services Offered Within the State of Louisiana

ORDER

Adopted: October 4, 1994; Released: October 4, 1994

By the Chief, Private Radio Bureau:

1. The Louisiana Public Service Commission (Louisiana) has filed an "emergency" motion for a 10-day extension of time from the October 4, 1994 deadline for filing reply comments, and a motion for expedited consideration of that motion.[1] For the reasons given below, we grant the motion.

2. The amendments to the Communications Act in the Omnibus Budget Reconciliation Act of 1993 preempted state rate and entry regulation of commercial mobile radio services. A state could, however, obtain intrastate rate regulatory authority by filing a properly supported petition with the FCC.[2] States with existing rate regulation could petition by August 10, 1994 to continue regulating, and would obtain a stay of statutory preemption until the FCC acted. The Commission has one year in which to rule on the petition and to decide any reconsideration. Louisiana filed such a petition on August 9, 1994. Pursuant to the Commission's rules,[3] interested parties had 30 days in which to comment and then 15 days for replies.

3. Louisiana states that an extension "is necessary in order to provide the Commission with a complete and accurate record on which to decide the numerous complex issues in this matter." The State claims that this extension "will not cause any undue hardship to any party nor will it retard the progress of this proceeding."[4] It adds that this proceeding will affect state interests in the manner in which mobile carriers are regulated, the development of the industry, and the rates paid by and services rendered to Louisiana ratepayers. It states that it has a constitutional charge to protect ratepayers' interests.[5] In requesting expedited consideration, Louisiana states that it has orally notified counsel of record of the filing of its motions.[6]

4. We believe that the motion has merit. The record in this proceeding is large, and the issues, including the state of competition in the cellular market in the state and the reasonableness of rates, intricate. We find that good cause has been shown for the requested extension.

5. Pursuant to Section 1.46 of the Commission's Rules,[7] we GRANT the Motion for Expedited Consideration of Emergency Motion on Behalf of the Louisiana Public Service Commission for 10-Day Extension of Time to Reply to Comments Filed by Various Mobile Carriers and the Emergency Motion on Behalf of the Louisiana Public Service Commission for 10-Day Extension of Time to Reply to Comments Filed by Various Mobile Carriers, AND HEREBY EXTEND the period for filing replies UNTIL October 14, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

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[1] Motion for Expedited Consideration of Emergency Motion on Behalf of the Louisiana Public Service Commission for 10-Day Extension of Time to Reply to Comments Filed by Various Mobile Carriers (dated Oct. 3, 1994) (Motion to Expedite); Emergency Motion on Behalf of the Louisiana Public Service Commission for 10-Day Extension of Time to Reply to Comments Filed by Various Mobile Carriers (dated Oct. 3, 1994)(Emergency Motion).

[2] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002 (b)(2), 107 State. 312, 392 (1993), amending Section 332 (c)(3) of the Communications Act, 47 U.S.C. § 332 (c)(3).

[3] Second Report and Order, Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1522-23 (1994), 59 Fed. Reg. 18493 (Apr. 19, 1994) (to be codified at 47 C.F.R. § 20.13).

[4] Emergency Motion at 1.

[5] Emergency Motion at 3.

[6] Motion to Expedite at 2. *See also* 47 C.F.R. § 1.46.

[7] 47 C.F.R. § 1.46.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company
Contingent Motion for Extension of Time

MEMORANDUM OPINION AND ORDER

Adopted: October 4, 1994; Released: October 4, 1994

By the Acting Chief, Tariff Division, Common Carrier Bureau:

I. INTRODUCTION

1. On September 26, 1994, Southwestern Bell Telephone Company (SWB) filed a "contingent" motion requesting an extension of time to comply with certain requirements of the Commission's *Virtual Collocation Order*[1] and the Common Carrier Bureau's (Bureau) *TRP Order*.[2] In the *Virtual Collocation Order*, the Commission, *inter alia*, required Tier 1 local exchange carriers (LECs) subject to expanded interconnection requirements to file by September 1, 1994 specific rates for virtual collocation equipment requests received by August 1, 1994, and to file by October 3, 1994 rates for requests received by September 1, 1994.[3] In its *TRP Order*, the Bureau required subject LECs to file certain cost support data in conjunction with rates for virtual collocation equipment.[4]

II. SUMMARY OF THE PLEADINGS

2. SWB seeks additional time to establish rate elements and provide cost support for specific items of equipment requested by MCI Telecommunications Corporation (MCI) on August 31, 1994, to be included in SWB's October 3 tariff filing.[5] SWB states that its motion is contingent upon the Commission determining that SWB is required to treat "any" of MCI's requests as reasonable.[6] SWB contends that, due to the vagueness of MCI's equipment list and MCI's refusal to clarify its request, SWB is unable to tariff equipment rates within the short time allotted.[7] SWB asserts that it expects to complete the establishment of rate elements and cost support by December 1, 1994, or within 60 days of receiving the necessary prices from all of its vendors, whichever is later.[8] SWB avers that it has satisfied the criteria for a waiver of the requirements of the Commission's orders.[9]

3. MCI asserts that SWB is the only LEC that could not respond to MCI's equipment list within the allotted time frame.[10] Moreover, MCI maintains, SWB is unable to meet the October 3 deadline because it failed to process MCI's list in a timely manner. According to MCI, the letters attached to SWB's motion indicate that SWB delayed submitting MCI's list to its vendors until September 16, 1994.[11] MCI therefore maintains that SWB has not met the standard for grant of a waiver of the requirements of the virtual collocation orders.[12]

III. DISCUSSION

4. As an initial matter, we conclude that SWB improperly characterized its motion for extension of time as being contingent upon the Commission's assessment of the reasonableness of MCI's equipment request. The *Virtual Collocation Order* did not predicate the LECs' obligation to file tariffs upon a Commission determination that interconnectors' equipment requests are reasonable. Rather, that Order established an unconditional requirement that LECs file revisions on October 3, 1994 for virtual collocation equipment requests received by September 1, 1994. Moreover, we note that in its September 1, 1994 tariff filing, SWB responded to MCI's initial equipment request in a timely manner without first seeking a Commission determination of the reasonableness of MCI's request. Thus, we need not assess the reasonableness of a customer's equipment request before deciding whether to require compliance with a Commission filing deadline.

5. We turn now to SWB's assertion that the instant circumstances satisfy the criteria for waiver of the *Virtual Collocation Order* 's requirement that it file tariff revisions on October 3, 1994. Waivers of the Commission's rules may be granted only for good cause shown.[13] The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.[14] The Court of Appeals has stated that waivers permit a more rigorous adherence to an effective regulation by allowing the agency to take into account considerations of hardship, equity, or more effective implementation of overall policy on an individualized basis, while also emphasizing that, "[a]n applicant for waiver faces a high hurdle even at the starting gate."[15] In *WAIT*

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[1] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Memorandum Opinion and Order, FCC 94-190, released July 25, 1994, *appeal docketed sub nom.*, Southwestern Bell Telephone Company v. FCC, Case No. 94-1547 (D.C. Cir. Aug. 10, 1994) (*Virtual Collocation Order*).

[2] Commission Requirements for Cost Support Material to be Filed with Virtual Collocation Tariffs for Special Access and Switched Transport, Tariff Review Plan Order, DA 94-819 (Comm. Carr. Bur., released July 25, 1994) (*TRP Order*).

[3] *See Virtual Collocation Order* at ¶36.

[4] *See generally TRP Order*.

[5] SWB Motion at 1.

[6] *Id.*

[7] *Id.* at 2-3. According to SWB, two of its suppliers cannot provide price quotes until October 7, and one vendor cannot provide the requested quotes until October 14. *Id.* at 4. SWB attached letters from its suppliers as an exhibit to its motion.

[8] *Id.* at 3-5. SWB notes that while its motion applies only to the immediate situation, it anticipates similar delays with respect to future equipment requests from interconnectors. *Id.* at 3 n.6.

[9] *Id.* at 6.

[10] MCI Opposition at 2-3.

[11] *Id.* at 3-4.

[12] *Id.* at 3.

[13] *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

[14] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*).

[15] WAIT Radio v. FCC, 418 F.2d 1135, 1159 (D.C. Cir. 1969),

Radio, the court explained that "[t]he very essence of a waiver is the assumed validity of the general rule ...."[16] The test identified in *WAIT Radio* requires the party seeking the waiver to demonstrate that the rule is unjust as applied to the party given the unique circumstances of the situation.[17] Waiver is thus appropriate only if special circumstances warrant a deviation from the general rule and such deviation will better serve the public interest than adherence to the general rule.[18] Therefore, the test for whether SWB may be granted a waiver is whether it has shown some unique or special circumstances, such as hardship or inequity, that warrant deviation from the Commission's virtual collocation rules and whether such deviation better serves the public interest.[19] For the reasons stated below, we find that SWB has failed to justify the relief it seeks.

6. SWB has not demonstrated that special circumstances warrant a deviation from the rule. Rather, SWB summarily argues that the requirement that it file tariff revisions on October 3, 1994 is unjust in light of the "unique circumstances surrounding virtual collocation."[20] SWB, however, neither describes what these circumstances are nor elaborates on what it is about these circumstances that justifies a waiver of our virtual collocation rules. Moreover, despite SWB's contention that it needs additional time because of the vagueness of MCI's request, we note that SWB did not require an extension of time to comply with MCI's initial request for equipment. Further, SWB took more than two weeks to submit MCI's equipment list to vendors, and it does not explain the reasons for this delay. In sum, SWB fails to demonstrate that it will suffer any hardship or that any special circumstances warrant deviation from the Commission's rules.

7. Nor has SWB convinced us that deviation from our filing deadline requirement will better serve the public interest than adherence to the general rule. SWB argues generally that accurate establishment of the required rate elements and cost support is in the public interest.[21] However, given the absence of any special circumstances, we conclude that SWB would better serve the public interest by filing its tariff revisions in a timely manner. Any unnecessary delay in filing tariff revisions to reflect an interconnector's equipment request undermines the cornerstone of the Commission's mandatory virtual collocation regime: that an interconnector may reasonably specify the central office basic transmission equipment to be dedicated to its use.[22] Thus, while accurate establishment of rate elements and cost support for the equipment requested by MCI is a worthy goal, SWB has failed to persuade us that its circumstances prevented it from accurately establishing rate elements and cost support within the time frame established by the Commission in the *Virtual Collocation Order*. We therefore find that SWB has failed to satisfy our waiver standard.

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED, pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, that the contingent motion for extension of time and petition for waiver filed by Southwestern Bell Telephone Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Geraldine A. Matise
Acting Chief, Tariff Division
Common Carrier Bureau

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cert. denied, 409 U.S. 1027 (*WAIT Radio*) (an agency's obligation to give meaningful consideration to waiver applications does not contemplate that agency must or should tolerate evisceration of a rule by waivers).

[16] *WAIT Radio*, 418 F.2d at 1158.

[17] *See* Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*), *citing WAIT Radio*, 418 F.2d at 1153; Industrial Broadcasting Co. v. FCC, 437 F.2d 680 (D.C. Cir. 1970).

[18] *See Northeast Cellular*, 897 F.2d at 1166 (grant of waiver vacated and remanded for failure of FCC to articulate any standard by which underlying policy could be determined; record revealed nothing unique about applicant's situation).

[19] *See, e.g.*, Petitions for Waiver of Transport Rate Structure and Pricing Requirements, 9 FCC Rcd 796, 800 (Com. Car. Bur. 1993); Petitions for Waiver of the Commission's Rules to Recover Network Depreciation Costs, 9 FCC Rcd 377, 389 (1993).

[20] SWB Motion at 6.

[21] *Id.*

[22] *See Virtual Collocation Order* at ¶44.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 5, 1994

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON GTE'S AND SNET'S PETITION FOR WAIVER OF COMMISSION'S RULES ON 500 ACCESS SERVICE

On September 26, 1994, GTE Service Corporation (GTE) petitioned the Commission for a waiver of Part 69 of the Commission's Rules seeking to establish new rate elements for recovery of costs associated with the provision of 500 Access Service. GTE states that 500 Access Service is a new offering that will allow customers to provide 500 Service to end users using the 500 Service Access Code. GTE proposes initially to charge a nonrecurring charge to recover the cost of modifying its switches in order to provide this service. GTE proposes to charge both nonrecurring and recurring charges in the future when 500 Access Service is provided through a data base query. GTE states that the new rate elements will ensure that those costs unique to the service are borne by the users of that service. GTE states that a waiver is necessary because there are no current Part 69 rate elements that encompass this service.

On September 28, 1994, Southern New England Telephone Company (SNET) also petitioned the Commission for a waiver of the Part 69 rules to establish a new service element for 500 Access Service. SNET states that the 500 Access Service will provide Personal Communications Service (PCS) providers with screening information using data base technology in order to identify and route PCS calls to the appropriate service provider. SNET states that it will establish a data base "per query charge" for the 500 Access Service. SNET states that be it also anticipates charging a one-time establishment charge for the service. SNET seeks a waiver to establish a rate structure that reflects the costs it incurs by offering this service.

Both Petitioners request that the Commission act on their waiver requests expeditiously because customers have requested this service under tariff as soon as possible.

Interested parties may file comments on these petitions for waiver by **14 days** from release of the Public Notice or on October 19, 1994 and reply comments by **9 days** after the due date for comments or on October 28, 1994 with the Secretary, FCC 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: ITS, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of these filings can be obtained from ITS, Inc. at (202) 857-3800.

We will treat these proceedings as non-restricted for purposes of the Commission's *ex parte* rules. *See generally,* 47 C.F.R. §§1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 418-1579.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-266

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992: Rate Regulation

FOURTH ORDER ON RECONSIDERATION

Adopted: September 30, 1994; Released: October 5, 1994

By the Commission:

I. INTRODUCTION

1. In this *Fourth Order on Reconsideration*, we consider whether to amend our price cap rules governing regulated cable service rates to permit cable operators to revise rates for regulated cable services to reflect changes in franchise fees without receiving prior franchising authority or Commission approval. We also consider whether to amend our rules to permit external cost treatment of Commission regulatory fees applicable to cable operators and to permit these fees to be passed through to subscribers under the same procedures as changes in franchise fees.[1]

II. FRANCHISE FEES

A. Background

2. Under the Commission's price cap rules, a cable operator is permitted to adjust its maximum monthly charge for regulated service tiers to reflect changes in certain categories of external costs, including franchise fees.[2] If an operator's basic service tier is being regulated in a particular franchise area by the franchising authority[3] or by the Commission,[4] the operator generally is not allowed under our rules to increase its rates for the basic service tier or related equipment and installations without first submitting the proposed increase to the franchising authority or the Commission, as the case may be, for review.[5] Under our rules, a franchising authority reviewing a proposed increase in basic rates has an initial 30 day period to make its decision.[6] The franchising authority may extend this period for an additional 90 days in a non-cost-of-service case or 150 days in a cost-of-service case.[7] During this period, the operator's proposed increase is not in effect. When the Commission is regulating basic rates, filings regarding rate increases must be made 30 days prior to the proposed effective date and such rate increases are effective on the date proposed unless the Commission issues an order deferring the effective date or denying the rate proposal.[8] With respect to cable programming service (CPS) rates, an operator must file rate increases for prior review by the Commission if the Commission has ordered the operator to reduce its CPS rates within the prior 12 months or some other period specified by the Commission in a particular case.[9] In addition, when a CPS complaint against the operator is pending before the Commission, an operator must give the Commission 30 days' notice of changes in any rates, including increases in rates attributable to increases in franchise fees.[10]

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[1] We take these actions on reconsideration on our own motion in order to establish a more complete implementation of Section 623 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543. Petitions for reconsideration in Docket MM 92-266 addressing other aspects of our rate rules remain pending and will be addressed in subsequent Orders.

[2] 47 C.F.R. § 76.922(d)(3)(i), (iv), and (viii). Cable systems are franchised by state or local governments or by a combination thereof or, in certain circumstances, by other governmental entities such as federal military installations. The payment of fees under the terms of any franchise is authorized by Section 622(a) of the Communications Act, is limited as to amount by Section 622(b), and such fees are to be accounted for in the establishment of rates under Section 623(b)(2)(c)(V). A separate federal (FCC) regulatory fee obligation was enacted as part of the Omnibus Budget Reconciliation Act of 1993. Pub. L. No. 103-66, Title VI, § 6003(a), 107 Stat. 397 (approved August 10, 1993). We established the categories of external costs, which include franchise fees, following notice and comment, in our *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 (1993) (*Rate Order*) at 5783-5790, paras. 241-254. The *Rate Order* also provided that franchise fees should be allocated between tiers in a manner reflective of the way in which they are assessed. *Rate Order* at 5790, para. 254. Consistent with the rules adopted in the *Rate Order*, our action herein with respect to the pass-through of both franchise and regulatory fees applies only to the extent there are net increases in the costs imposed on the system operator. Fees may not be passed through to the extent there are other fee changes that offset the increase.

[3] An operator becomes subject to regulation by the franchising authority after the franchising authority has become certified by the FCC to regulate basic rates, has adopted the appropriate regulations, and has notified the operator that it has been certified to regulate. See 47 C.F.R. §§ 76.910 and 76.930.

[4] See 47 C.F.R. § 76.913.

[5] 47 C.F.R. §§ 76.933 and 76.945; see also Questions and Answers on Cable Television Rate Regulation, Answer No. 4 (released by the Cable Services Bureau on July 27, 1994) (concluding that prior regulatory approval of new rates under Commission's revised rate regulations was not required where regulations required new rates to be implemented before rate justification forms were due). The Commission established the mechanisms for allowing regulatory review of proposed rate increases in the *Rate Order* following notice and comment. *See Rate Order* at 5709-5710, paras. 118-119.

[6] 47 C.F.R. § 76.933.

[7] *Id.*

[8] 47 C.F.R. § 76.945.

[9] 47 C.F.R. § 76.960; see also e.g., FCC Form 393 at page 2, general instruction 1.

[10] 47 C.F.R. § 76.958.

B. Discussion

3. On reconsideration, we determine that we should permit adjustments to capped rates to reflect increases in franchise fees without prior regulatory approval.[11] These fees are generally set by the franchising authority itself. Thus, the fees are set by a government entity which is aware of and sensitive to the fees' impact upon consumers. Since it is the franchising authority which has set the franchise fee, prior regulatory review appears less necessary from a consumer protection standpoint than it is for other categories of external costs.

4. Accordingly, as of the effective date of this *Order*, where the franchising authority is regulating basic rates, increases in basic rates attributable to increases in franchise fees will not be subject to the prior approval requirements for proposed rate increases set forth in Section 76.933(a)-(c) of our rules. However, operators will continue to be required to give subscribers and the franchising authority 30 days' advance notice of any rate change, as required by our rules.[12] When the operator provides the 30 days' notice to the franchising authority, it must also provide documentation that demonstrates that the rate increase has been properly calculated.[13]

5. As under existing rules, where the Commission is regulating basic service tier rates,[14] operators must give the Commission 30 days' advance notice of any such increase attributable to franchise fee increases.[15] Operators must also give subscribers and franchising authorities 30 days' advance notice of changes in basic rates attributable to increases in franchise fees as required by our rules.[16] In addition, where the Commission is regulating basic service rates, the operator should submit with its filing to the Commission the same documentation which it would need to submit if the franchising authority were regulating basic service rates as outlined above in paragraph 4. The Commission will review such filings according to its existing rules.[17]

6. The franchising authority or the Commission, as appropriate, may then review the pass-through of increases in franchise fees[18] and may order a prospective rate reduction and refunds in accordance with our rules in the event the operator has increased its basic service rates by more than the increase in franchise fees properly allocable to the basic tier.[19] The burden of demonstrating that any such increases are proper shall remain on the operator as with any other rate adjustments.[20]

7. Operators that have had cable programming service rates deemed unreasonable within the prior 12 months, or some other period specified by the Commission in a particular case, must submit increases in CPS rates attributable to an increase in franchise fees to the Commission for its review.[21] Rate justifications relating to franchise fee-related increases in CPS tier rates will be reviewed by the Commission according to existing rules for Commission review of basic service tier rates.[22]

8. These rule revisions do not change our rules governing rate adjustments attributable to decreases in external costs, including franchise fees. Decreases in franchise fees allocable to either the basic service or a CPS tier will continue to be treated as external cost decreases under our existing rules. Such decreases must be passed through to subscribers within the periods set forth in our rules for passing through decreases in external costs.[23] The operator must provide 30 days' notice to subscribers, the local franchising authority and the Commission, as appropriate.[24] As with franchise fee increases, operators must provide documentation for the amount of the decrease.[25]

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[11] This decision supersedes Answer No. 5 in the Questions and Answers released by the Cable Services Bureau on May 18, 1994 which interpreted the Commission's price cap rules as requiring prior approval before franchise fee increases could be passed through. The Commission received requests to reconsider that Answer. *See* Petition for Correction and Revision filed by TKR Cable Company and Cable Telecommunications Association on June 3, 1994; and Letter from Cole, Raywid & Braverman (dated May 26, 1994). These requests are rendered moot by this *Order*.

[12] See 47 C.F.R. § 76.964(b). This notice requirement applies whether or not a franchising authority is regulating basic service tier rates. In addition, operators will continue to be required to provide 30 days' notice to the Commission if a cable services tier complaint is pending. *See* 47 C.F.R. § 76.958.

[13] We find it unnecessary to prescribe the precise form of this documentation. The operator need not use FCC Form 1210 since Form 1210 was not specifically designed for use in calculating rate adjustments that reflect changes in franchise fees. To the extent that Answer No. 5, in the Questions and Answers released by the Cable Services Bureau on May 18, 1994, is inconsistent on this point, it is superseded.

[14] See 47 C.F.R. § 76.945.

[15] *See* 47 C.F.R. § 76.945(c).

[16] *See* 47 C.F.R. § 76.964(b).

[17] *See* 47 C.F.R. § 76.945.

[18] The procedures set forth in Section 76.933 of our rules will apply to franchising authority review of rate increases resulting from franchise fee pass-throughs, except that the increased rate attributable to the increased franchise fee will be treated as an "existing rate" for the purposes of Section 76.933. Thus, franchising authorities will have an initial 30-day period, beginning on the date the operator provides notice and supporting documentation, whichever is later, to review the rates. The rate increase will go into effect at the end of this 30-day period. The franchising authority may extend the period for reviewing rates for an additional 90 days in a non-cost-of-service case or 150 days in a cost-of-service case by issuing a tolling order within the initial 30 day period. It may further extend its period for review by issuing an accounting order prior to the expiration of the 90 or 150 day additional period. *See* 47 C.F.R. § 76.933(a)-(c). However, during these periods the increased rate is in effect. Consistent with Section 76.933, we will not impose an obligation on franchising authorities to affirmatively approve such an increase. They will not have to take any action unless they wish to disapprove the increase. The procedures set forth in Section 76.945 will apply to Commission review of rate increases resulting from franchise fee pass-throughs.

[19] See 47 C.F.R. §§ 76.942, 76.945.

[20] See 47 C.F.R. § 76.937.

[21] *See* 47 C.F.R. § 76.960. Franchise fees will continue to be allocated in a manner that is most consistent with the assessment methodology used by franchising authorities. *See* 47 C.F.R. 76.924(f). Under that rule, a portion of franchise fee increases may, in some circumstances, be allocated to cable programming service tiers.

[22] *See* 47 C.F.R. § 76.945.

[23] See 47 C.F.R. § 76.922(d)(3)(i), (iii).

[24] *See* 47 C.F.R. §§ 76.945(c), 76.958, 76.964(b).

[25] *See supra* n.13.

III. REGULATORY FEES

A. Background

9. Section 9 of the Communications Act of 1934, as amended, requires the Commission to collect cable system regulatory fees of $370 per 1,000 subscribers from cable television systems on an annual basis.[26] The purpose of requiring cable systems to pay regulatory fees to the Commission is to permit the Commission to recover the annual cost of its various regulatory activities.[27] In a Report and Order released June 8, 1994, in MD Docket No. 94-19, the Commission adopted implementing rules providing for the payment of regulatory fees in fiscal year 1994 and thereafter.[28] In that *Report and Order*, we decided to assess the cable system regulatory fee on an exact per subscriber basis (*i.e.*, $0.37 per subscriber per year or approximately $0.03 per subscriber per month).[29] We provided that regulatory fees be paid on this basis so that cable systems serving less than 1,000 subscribers would not pay a disproportionately high regulatory fee.[30] The first cable system regulatory fee payments for fiscal year 1994 were due on August 12, 1994.[31]

10. Cable operators in MD Docket No. 94-19 urged the Commission to permit cable systems to pass regulatory fees through to subscribers as external costs.[32] In that Report and Order, we concluded that the pass-through issue was not within the scope of the docket and should, therefore, be addressed separately.[33]

B. Discussion

11. Cable system regulatory fees are mandated by Congress, collected by the Commission, and are intended to reimburse the Commission for administering its regulatory responsibilities under the Communications Act of 1934. As such, they are exceptional, newly imposed, governmentally-assessed fees that further the purposes of the Communications Act. These fees are also beyond the control of the cable operator. Furthermore, the fees are easily measurable in amount. Consistent with the Commission's prior decision to determine on a case-by-case basis whether categories of costs should be accorded external cost treatment,[34] we determine that Commission regulatory fees should be accorded external cost treatment under our price cap rules governing cable service rates.[35]

12. We further determine that cable system regulatory fees should be directly assigned to the basic service tier. Direct assignment to the basic service tier is appropriate because the cable system regulatory fees are assessed on a per subscriber basis and all subscribers receive the basic service tier. The Commission's regulatory fees order defines a "subscriber" in a manner consistent with this method of assignment as "a member of the general public who receives *broadcast* programming distributed by a cable television system...." (emphasis added).[36] Broadcast programming is required to be offered on the basic service tier.[37] In addition, if we were to permit cable systems to assign all of the regulatory fee to the CPS tiers, then basic-only subscribers would not pay any of the regulatory fee even though the fee is assessed on a per subscriber basis and is intended to reimburse the agency for more than CPS tier regulation. And, if we were to allow cable systems to allocate the fee among basic and CPS tiers on a weighted or other basis, then some subscribers would pay more than three cents a month and other subscribers would pay less. Assignment to the basic service tier is also consistent with the fact that regulatory fees are intended to reimburse the Commission for the costs of regulating cable service, including Commission oversight of the basic service tier and other regulatory activities such as rulemaking, the direct regulation of some systems' basic tier rates and review of local franchising authorities' decisions. We find, therefore, that the most equitable means of permitting cable systems to pass through to subscribers regulatory fees is by requiring cable systems to directly assign the fee entirely to the basic service tier.

13. We believe that cable operators should be permitted to adjust rates on account of the regulatory fees without prior regulatory approval, subject to our requirements for 30 days' advance notice.[38] Thus, operators may adjust rates to reflect the newly imposed regulatory fees, and any subsequent increases in the fees, in the same manner that rates may be adjusted for increases in franchise fees, as discussed above. Decreases in Commission regulatory fees will continue to be treated as external cost decreases under our existing rules and must be passed through to subscribers in accordance with those rules.[39]

14. Operators shall recover the annual regulatory fee according to the following schedule. Regulatory fees of $0.37 per subscriber that were due on August 12, 1994

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[26] 47 U.S.C. § 159. The statute also permits the Commission to adjust the amount of the regulatory fees in subsequent years. 47 U.S.C. § 159(b).

[27] 47 U.S.C. § 159.

[28] Implementation of Section 9 of the Communications Act: Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year , MD Docket No. 94-19, Report and Order, 59 Fed. Reg. 30984 (June 16, 1994) (*Regulatory Fees Order*).

[29] Regulatory Fees Order at paras. 99-100, 59 Fed. Reg. at 30995-30996.

[30] Id.

[31] *Public Notice: Cable Television System Regulatory Fees* (June 20, 1994). Fiscal year 1994 runs from October 1, 1993 through September 30, 1994. Systems owing regulatory fees greater than $18,500 were permitted to pay half the amount owed on August 12, 1994 and the remainder no later than September 9, 1994. *Id.* at 3.

[32] *Regulatory Fees Order* at n.41, 59 Fed. Reg. at 30996.

[33] Id.

[34] *See* Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket No. 92-266, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, 9 FCC Rcd 1164 (1993) (*First Rates Reconsideration Order)* at 1211-1212, paras. 89-90.

[35] The *Regulatory Fees Order*, implementing regulatory fees on cable television systems, also provided that, for fiscal year 1994, each Cable Television Antenna Relay Service (CARS) licensee would be assessed a regulatory fee of $220 per license by the Commission. *Re gulatory Fees Order* at Appendix B, para. 30, 59 Fed. Reg. at 31007. We decline to provide for the external cost treatment of CARS regulatory fees. CARS license regulatory fees are assessed on a flat fee basis of $220 per license and should not represent significant amounts to most operators. We will consider the need to permit external cost treatment of CARS regulatory fees for small systems upon completion of our cost studies.

[36] *Regulatory Fees Order* at Appendix B, n.4, 59 Fed. Reg. at 31007.

[37] 47 U.S.C. § 543(b)(7); 47 C.F.R. § 76.901(a).

[38] See 47 C.F.R. §§ 76.945(c), 76.958, 76.964(b).

[39] See 47 C.F.R. § 76.922(d)(3)(i), (iii).

and/or September 9, 1994 for fiscal year 1994 (October 1, 1993 - September 30, 1994) shall be recovered from subscribers over a ten month period beginning in December of 1994 and ending in September of 1995. For the first three months of this ten month period (December 1994 -February 1995), operators shall recover $0.03 per month per subscriber. For the remaining seven months (March 1995 - September 1995), operators shall recover $0.04 per month per subscriber. Operators may provide notice of the entire fiscal year's regulatory fee pass-through in a single notice so long as that notice states that the fee pass-through will increase from $0.03 in February 1995 to $0.04 in March 1995. Regulatory fees that are assessed for subsequent fiscal years shall be recovered in twelve monthly installments during the fiscal year following the fiscal year for which the payment was imposed. For example, operators may begin recovering regulatory fees paid for fiscal year 1995 during the 12 month period from October 1995 through September 1996. Payments shall be collected in equal monthly installments, except that for so many months as may be necessary to avoid fractional payments, an additional $0.01 payment per month may be collected. All such additional payments shall be collected in the last month or months of the fiscal year, so that once collections of such payments begin there shall be no month remaining in the year in which the operator is not entitled to such an additional payment. Recovery of regulatory fees paid for fiscal year 1995 and subsequent fiscal years is, of course, subject to the notice requirements contained in this *Order*. We recognize that operators will not recover the regulatory fee until after they have paid it. However, operators may not assess interest on the amount charged to subscribers for regulatory fees in order to avoid the substantial administrative burdens on operators and regulators in determining and reviewing interest calculations.

IV. REGULATORY FLEXIBILITY ACT ANALYSIS

Final Analysis for the Fourth Order on Reconsideration

15. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, the Commission's final analysis with respect to the Fourth Order on Reconsideration is as follows:

16. *Need and purpose of this action.* The Commission, in compliance with § 3 of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 543 (1992) pertaining to rate regulation, adopts revised rules and procedures intended to ensure cable subscribers of reasonable rates for cable services with minimum regulatory and administrative burden on cable entities.

17. *Summary of issues raised by the public in response to the Initial Regulatory Flexibility Analysis.* There were no comments submitted in response to the Initial Regulatory Flexibility Analysis. The Chief Counsel for Advocacy of the United States Small Business Administration (SBA) filed comments in the original rulemaking order. The Commission addressed the concerns raised by the Office of Advocacy in the Rate Order.[40]

18. *Significant alternatives considered and rejected.* Petitioners representing cable interests and franchising authorities submitted several alternatives aimed at minimizing administrative burdens. The Commission responded to these comments in previous Orders in this docket. Although the Commission is issuing this *Order* on its own motion, the Commission has attempted to accommodate commenters' concerns and to reduce administrative burdens by providing an expedited method to pass through franchise fees and Commission regulatory fees.

V. ORDERING CLAUSES

19. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 303(r), and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 543, that, Sections 76.922, 76.924, and 76.933 of the Commission's rules, 47 C.F.R. Sections 76.922, 76.924, and 76.933 ARE AMENDED as set forth in the attached Appendix.

20. IT IS FURTHER ORDERED that, this *Fourth Order on Reconsideration* IS EFFECTIVE 30 days after the date of publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX

Part 76 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

PART 76 - CABLE TELEVISION SERVICE

1. The authority citation for Part 76 continues to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 1101; 47 U.S.C. Secs. 152, 153, 154, 301, 303, 307, 308, 309, 532, 533, 535, 542, 543, 552, as amended, 106 Stat. 1460.

2. Section 76.922(d)(3)(iv) is amended to add section (F) to read as follows:

§ 76.922 Rates for the basic service tier and cable programming services tiers.

* * * * *

(d)(3)(iv) External costs shall consist of costs in the following categories:

(A) State and local taxes applicable to the provision of cable television service;

(B) Franchise fees;

[40] *Rate Order* at 5978-5983, paras. 566-574.

(C) Costs of complying with franchise requirements, including costs of providing public, educational, and governmental access channels as required by the franchising authority;

(D) Retransmission consent fees and copyright fees incurred for the carriage of broadcast signals;

(E) Other programming costs; and

(F) Commission cable television system regulatory fees imposed pursuant to 47 U.S.C § 159.

* * * * *

3. Section 76.924 is amended to add a new paragraph (f)(5) to read as follows and to redesignate existing paragraphs (5) and (6) as paragraphs (6) and (7):

§ 76.924 Cost accounting and cost allocation requirements.

* * * * *

(f)(5) Commission cable television system regulatory fees imposed pursuant to 47 U.S.C. § 159 shall be directly assigned to the basic service tier.

* * * * *

4. Section 76.933 is amended to add paragraphs (e) and (f) to read as follows:

§ 76.933 Franchising authority review of basic cable rates and equipment costs.

* * * * *

(e)Notwithstanding the foregoing, when the franchising authority is regulating basic service tier rates, a cable operator may increase its rates for basic service to reflect the imposition of, or increase in, franchise fees or Commission cable television system regulatory fees imposed pursuant to 47 U.S.C. § 159, upon 30 days' notice to subscribers and the franchising authority and, where required by Section 76.958, to the Commission. For the purposes of paragraphs (a) - (c) of this Section 76.933, the increased rate attributable to Commission regulatory fees or franchise fees shall be treated as an "existing rate," subject to subsequent review and refund if the franchising authority determines that the increase in basic tier rates exceeds the increase in regulatory fees or in franchise fees allocable to the basic tier. This determination shall be appealable to the Commission pursuant to Section 76.944 of these rules. When the Commission is regulating basic service tier rates pursuant to Section 76.945 of these rules or cable programming service rates pursuant to Section 76.960 of these rules, an increase in those rates resulting from franchise fees or Commission regulatory fees shall be reviewed by the Commission pursuant to the mechanisms set forth in Section 76.945 of these rules. A cable operator must adjust its rates to reflect decreases in franchise fees or Commission regulatory fees within the periods set forth in Section 76.922(d)(3)(i),(iii) of these rules.

(f)Cable television system regulatory fees assessed by the Commission pursuant to 47 U.S.C. § 159 shall be recovered in monthly installments during the fiscal year following the fiscal year for which the payment was imposed. Payments shall be collected in equal monthly installments, except that for so many months as may be necessary to avoid fractional payments, an additional $0.01 payment per month may be collected. All such additional payments shall be collected in the last month or months of the fiscal year, so that once collections of such payments begin there shall be no month remaining in the year in which the operator is not entitled to such an additional payment. Operators may not assess interest. Operators may provide notice of the entire fiscal year's regulatory fee pass-through in a single notice.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-94-317

Application for authority to convey capacity in the HAW-4/TPC-3 Cable System.

ORDER AND AUTHORIZATION

Adopted: September 24, 1994; Released: October 13, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-317 IS GRANTED, and American Telephone and Telegraph Company (AT&T) is authorized to convey, on an Indefeasible Right of User (IRU) basis, one-half interests in the MAUOs[1] in the HAW-4/TPC-3 Cable System listed below:

NO. OF MAUOs	SEGMENT(S)	CARRIER
30	B, D1, D2	MCII
10	B	Fintel (Fiji)
30	B, D1, D3	ITDC (Tokyo)
60	D2, D3	ITDC (Tokyo)
43	B, D1, D3	IT&E (Guam)
30	D2, D3	IT&E
60	D2, D3	TAS (Singapore)
90	D2, D3	PLDT (Philippines)
30	D2, D3	HKTI (Hong Kong)
75	D2, D3	TNZI (New Zealand)
5	D2, D3	GMCR (Philippines)
30	B, D1, D3	GMCR (Philippines)
810	D2, D3	OTC (Australia)
1	B	New Guinea
60	B, D1, D3	WorldCom
2	D2, D3	Capwire (Philippines)
23	D1, D2	KDD (Tokyo)

3. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this Order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

[1] An MAUO is a minimum assignable unit of ownership, which is a 64-kbps equivalent circuit.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ST. THOMAS AND SAN JUAN TELEPHONE CO. File No. I-T-C-94-420

Application for authority to acquire and operate facilities for service between the U.S. and Panama.

ORDER AND AUTHORIZATION

Adopted: September 30, 1994; Released: October 13, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Panama by St. Thomas and San Juan Telephone Co. (STSJ).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-420 IS GRANTED and STSJ is authorized to:

a. lease from Comsat and operate 24 voice-grade satellite circuits between the Corporate Satellite Communications, Inc. (CSC) earth station in Miami, Florida and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Panama furnished by STSJ's correspondent in Panama;

b. lease from CSC and operate 24 voice-grade circuits in the Miami earth station to be used in conjunction with the satellite space segment capacity;

c. own and operate 24 voice-grade connecting circuits between the earth station and STSJ's operating center; and

d. use facilities in a, b and c above to provide STSJ's regularly authorized services between the U.S. and Panama.

3. IT IS FURTHER ORDERED that our authorization of STSJ to provide private lines as part of its authorized services is limited to the provision of such private lines only between the United States and Panama -- that is, private lines which originate in the United States and terminate in Panama or which originate in Panama and terminate in the United States. In addition, STSJ may not -- and STSJ's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Panama end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Panama affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither STSJ nor any persons or companies directly or indirectly controlling or controlled by STSJ, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which STSJ or any persons or companies controlling or controlled by STSJ are parties.

5. IT IS FURTHER ORDERED that the applicant shall file copies of any operating agreement it enters into with its foreign correspondent with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-35

In the Matter of

Amendment of Section 73.202(b), RM-8442
Table of Allotments,
FM Broadcast Stations.
(Muscatine, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 4, 1994; Released: October 13, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Muscatine Communications, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 2193, (1994), proposing the allotment of Channel 226A to Muscatine, Iowa, as the community's second local commercial FM transmission service. Petitioner filed comments reiterating its intention to apply for Channel 226A, if allotted to Muscatine. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 226A to Muscatine, since it would provide the community with an additional local aural transmission service. Channel 226A can be allotted to Muscatine in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3.0 miles) south in order to avoid a short-spacing with the licensed site of Station KATF(FM), Channel 225C1, Dubuque, Iowa.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 28, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Muscatine, Iowa	226A, 259C1

4. The window period for filing applications will open on **November 28, 1994**, and close on **December 29, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

[1] The coordinates for Channel 226A at Muscatine are North Latitude 41-22-52 and West Longitude 91-04-26.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-9

In the Matter of

Amendment of Section 73.202(b), RM-8423
Table of Allotments,
FM Broadcast Stations.
(Tunica, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 4, 1994; Released: October 13, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Tunica Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 679 (1994), proposing the allotment of Channel 241C3 to Tunica, Mississippi, as the community's first local FM service. Petitioner filed comments restating its interest to apply for Channel 241C3, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 241C3 to Tunica, since it could provide the community with its first local FM service. Channel 241C3 can be allotted to Tunica in compliance with the Commission's minimum distance separation requirements with a site restriction of 6.8 kilometers (4.2 miles) southwest in order to avoid short-spacing conflicts with Station WLZA-FM, Channel 241C2, Eupora, Mississippi, and with a rule making (RM-8336) to allot Channel 240C3 at Harrisburg, Arkansas.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204 (b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 28, 1994**, the FM Table of Allotments, Section 73.202 (b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Tunica, Mississippi	241C3

4. The window period for filing applications will open on **November 28, 1994**, and close on **December 29, 1994**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 241C3 at Tunica are North Latitude 34-38-56 and West Longitude 90-26-39.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CAPITOL SATELLITE AND COMMUNICATIONS SYSTEMS, INC. File No. I-T-C-94-319

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the United States and various international points via the INTELSAT, Pan American Satellite, Solidaridad and Anik satellite systems for the provision of international video services

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 22, 1994 Released: October 13, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communications between the U.S. and various international points via the INTELSAT, Pan American Satellite (PAS), Solidaridad and Anik satellite systems for the provision of international video services, it is hereby CERTIFIED that the public convenience and necessity will be served by its grant.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-319 IS GRANTED and Capitol Satellite and Communications Systems, Inc. (CSCS) is authorized to:

a. establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites connecting with similar circuits between the satellite and those countries listed in Comsat's tariff for international television service provided by CSCS's correspondents in those countries for the provision of international television service.

b. establish channels of communications between appropriately licensed earth stations in the U.S. and the PAS-1 system connecting with similar circuits between the satellite and those countries specified in Attachment A (Parts (a) and (b), respectively) furnished by CSCS's correspondents in those countries;

c. lease and operate facilities in the U.S. earth stations authorized to communicate with the PAS satellite system;

d. lease and operate necessary domestic connecting facilities;

e. use the facilities set forth in b, c, and d, above to provide international television service between the U.S. and those countries listed in Attachment A subject to any restrictions set forth in this or any other Commission Order involving separate international satellite systems;

f. establish channels of communication between appropriately licensed earth stations in the U.S. and the Mexican Solidaridad satellite system for the provision of television service between the U.S. and Mexico consistent with INTELSAT Article XIV(d) consultations governing the use of the Solidaridad system; and

g. establish channels of communication between appropriately licensed earth stations in the U.S. and the Canadian Anik satellite system for the provision of television service between the U.S. and Canada consistent with INTELSAT Article XIV(d) consultations governing the use of the Anik system.

3. IT IS FURTHER ORDERED that neither CSCS nor any persons or companies directly or indirectly controlling or controlled by CSCS, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which CSCS or any persons or companies controlling or controlled by CSCS are parties.

4. IT IS FURTHER ORDERED the applicant shall file copies of any operating agreements, including the applicable accounting rate, it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application for the use of any additional circuits it wishes to operate via the PAS-1 satellite.

8. IT IS FURTHER ORDERED that the number of circuits authorized herein for the provision of services via separate satellite systems is subject to the limitations specified under the separate systems policy, applicable consultations under Article XIV(d) of the INTELSAT Agreement and PAS's determination whether such capacity can be offered in light of these limitations.

9. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applica-

tions for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

ATTACHMENT A

Capitol Satellite is authorized to provide via the PAS satellite system a total of ten (10) 36-Mhz transponders on each of the following satellites for the provision of international television service between the U.S. and countries not members of INTELSAT and between the U.S. and the following INTELSAT member countries:

PAS-1

(a) Ku-band Countries:

Anguilla, Austria, Azerbaijan, Bahamas, Belgium, Bermuda, British Virgin Islands, Cayman Islands, Czech Republic, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, Monaco, Montserrat, Netherlands, Portugal, Romania, Russian Federation, Spain, Sweden, Switzerland, Turks and Caicos Islands, the United Kingdom, Yugoslavia.

(b) C-band Countries:

Anguilla, Argentina, Aruba, Bahamas, Barbados, Bermuda, Bolivia, Brazil, British Virgin Islands, Cayman Islands, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Montserrat, Netherlands Antilles, Panama, Paraguay, Peru, Trinidad and Tobago, Turks and Caicos Islands, Uruguay and Venezuela.

PAS-4

Australia, Hong Kong, and New Zealand.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WILTEL INTERNATIONAL, INC. — File No. I-T-C-94-227

Application for authority to acquire and operate satellite and cable facilities for the provision of direct services between the United States and Cuba

MCI TELECOMMUNICATIONS CORP. — File No. I-T-C-94-228

LDDS COMMUNICATIONS, INC. — File No. I-T-C-94-229

SPRINT COMMUNICATIONS COMPANY L.P. — File No. I-T-C-94-247

IDB WORLDCOM SERVICES, INC. — File No. I-T-C-94-260

Applications for authority to acquire and operate satellite facilities for the provision of direct services between the United States and Cuba

MEMORANDUM OPINION, ORDER, AUTHORIZATION & CERTIFICATION

Adopted: October 4, 1994; Released: October 13, 1994

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications filed by WilTel International, Inc. ("WilTel"), MCI Telecommunications Corporation ("MCI"), LDDS Communications, Inc. ("LDDS"), Sprint Communications Company L.P. ("Sprint"), and IDB WorldCom Services, Inc. ("IDB") requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between the United States and Cuba for the provision of direct services. The applications were placed on the Commission's public notice. AT&T filed petitions to deny against all of the applications. For the reasons stated below, we grant the applications.

BACKGROUND

2. WilTel requests authority to acquire by lease from Comsat and operate 120 64-kbps digital satellite voice-grade circuits, and up to two satellite video transmission circuits on an occasional use basis, provided via the INTELSAT Atlantic Ocean Region (AOR) satellite at 335^0 E.L., for the provision of international message telephone service ("IMTS") and other switched services[1] and for international private line service between the United States and Cuba. In an amendment to its application, WilTel also requests the flexibility to use either the INTELSAT and/or an Intersputnik satellite. WilTel states the proposed satellite facilities will be located between an appropriately authorized U.S. international fixed-satellite earth station and the appropriate satellite.[2]

3. MCI requests authority to acquire by lease from Comsat and operate 150 64-kbps satellite circuits[3] between the Mount Jackson, Virginia earth station and an appropriate INTELSAT-AOR satellite, together with the necessary connecting facilities between the Mt. Jackson earth station and MCI's operating centers at Pottstown, Pennsylvania and San Antonio, Texas, for the provision of all of MCI's authorized services, including IMTS, between the United States and Cuba.

4. LDDS requests authority to acquire by lease from Comsat and operate 150 64-kbps satellite circuits between an appropriately authorized east coast earth station and an appropriate INTELSAT-AOR satellite for the provision of IMTS and private line services between the United States and Cuba. In an amendment to its application, LDDS also requests authority to use interchangeably the 150 circuits with the Intersputnik, or Columbia Communication Corporation ("Columbia") satellites in addition to the INTELSAT satellites.

5. Sprint requests authority to acquire by lease from Comsat and operate 120 voice-grade satellite circuits[4] between the Orion international Standard A earth station located at Shenandoah, Virginia and the INTELSAT-AOR satellite at 335^0 E.L., connecting with its operating center in New York, New York, by using its own facilities. Sprint proposes to use these facilities to furnish all of Sprint's authorized services, including IMTS, between the United States and Cuba.

[1] These services include facsimile, data and video transmission services.

[2] WilTel also requests authority to provide service to Cuba via the fiber optic undersea cable, CUBUS-1, that has been proposed in the application for a cable landing license of WilTel Undersea Cable, Inc., FCC File No. SCL-94-002. Because this cable landing license has yet to be granted, we will defer acting on WilTel's request to use these facilities until such time that we are assured the cable facilities will be available for WilTel's use.

[3] MCI states these circuits are bearer circuits with a compression ratio ability of 5: 1, thereby allowing MCI to potentially derive as many as 750 circuits.

[4] Sprint initially requested 30 digital satellite circuits, but

6. IDB requests authority to acquire by lease from Comsat and operate 120 voice-grade satellite circuits[5] between an appropriately authorized international earth station in the United States and either an INTELSAT-AOR satellite or the Intersputnik satellite located at 14^0 W.L. ("Statsionar 4"), together with the necessary connecting facilities between the earth station and an operating center in New York, New York, for the provision of IMTS between the United States and Cuba.

7. All of the applicants state that they have reached an agreement with EMTELCUBA of Cuba, to provide the matching facilities from the satellites' mid-point to an earth station in Cuba. Initially, under the terms of the agreements, EMTELCUBA agreed with each applicant to a 50/50 split of a $1.20 per minute accounting rate for switched traffic, and a $4.85 surcharge per call for collect calls to be paid to the originating carrier. All of the applicants state that this rate is consistent with the U.S. Department of State's policy guidelines ("Policy Guidelines").[6] They also state that they will initiate service within one year.

8. The applicants state that the public interest would be served by a grant of their applications because it will result in the rapid introduction of new lines of telecommunications between the United States and Cuba. They state that an immediate and large demand exists for direct telecommunications services between the United States and Cuba, and their proposed services will help meet that demand within the regulatory framework established by the Cuban Democracy Act of 1992 (22 U.S.C. § 6002 et seq.).

9. AT&T filed a petition to deny against each of these applications stating that because of the $4.85 surcharge per call for collect calls, the applicants' accounting rate agreements with EMTELCUBA conflict with the International Settlements Policy ("ISP") and with the directive of the Commission that U.S. carriers negotiate to achieve cost-based accounting rates with foreign administrations.[7] All of the applicants individually filed oppositions to AT&T's petition. They unanimously agreed that an ISP waiver under §64.1001 of the Commission's Rules is not required because AT&T's operating agreement with the Cuban administration expired nearly four years ago. Therefore, the applicants argue that because AT&T's operating agreement is no longer in force, their proposed arrangements do not depart from any current arrangements, and no ISP waiver is required. In addition, WilTel, MCI, and LDDS argue that the Policy Guidelines do not prohibit collect surcharges, and that the $4.85 surcharge per call is appropriate and not excessive for collect calls.

DISCUSSION

10. In a letter dated July 22, 1993, the U.S. Department of State informed us of the Executive Branch's general policy guidelines for implementation of the telecommunications provisions of the Cuban Democracy Act, which provides that "telecommunication services between the United States and Cuba shall be permitted."[8] Among the policy guidelines are the following requirements: 1) the proposals must have the potential to be operational within a year; 2) settlements must not be more favorable to Cuba than the current 50/50 split of the $1.20 per minute accounting rate; 3) proposals must be limited to equipment and services necessary to deliver a signal to Cuba; 4) proposals must utilize modes of communications already in place between the United States and Cuba; and 5) carriers shall report the number of circuits activated by facility on June 30 and December 31 of each year and on the one-year anniversary of the notification by the Commission in the Federal Register.

11. In accordance with the Policy Guidelines, we forwarded copies of the above-captioned applications to the Department of State and requested that it advise us as to its views. Pursuant to our request, the Department of State issued a follow-up letter dated May 23, 1994.[9] The Department of State found the IMTS portions ofthe applications to be fully consistent with the Policy Guidelines except for the $4.85 surcharge per call for collect calls. The Department found that the proposed surcharge was unreasonable and unjustified. It observed that the proposed surcharge far exceeded the approximately $.60 average rate for all countries in the region and the prevalent $1.00 rate for those countries having a surcharge. Therefore, the Department of State had no objection to our approval of the IMTS applications without the $4.85 surcharge provision. The Department of State, however, did state that it would favorably consider a surcharge provision that is determined by us to be based on costs, other international norms and practices, relevant ITU Recommendations, and our ISP.

12. In light of the Department of State's letter, and our own review of the applications, we concluded that we would not process the applications as filed because of the agreements with EMTELCUBA for the $4.85 surcharge. Rather than dismiss the applications, we gave the applicants the opportunity to amend their applications to reflect a new agreement renegotiated with EMTELCUBA that provides for either no surcharge for collect calls, or a surcharge that was reasonable and justified.[10]

13. On September 6, 1994, LDDS amended its application to include a new operating agreement with EMTELCUBA that reflected a reduction in the proposed surcharge of $4.85 per call for collect calls to $1.00 per call. A week later, the other four applicants similarly amended their applications to reflect a $1.00 per call surcharge. We sent copies of these amendments to the Depart-

clarified its request in a letter to the Commission on October 3, 1994, stating that the circuits are equivalent to one E-1 circuit which, in turn, can derive 120 virtual voice-grade circuits.

[5] IDB states these are the number of circuits derived from one 2 Mbps channel (an E-1 circuit) operating at a compression ratio of 4: 1.

[6] *See infra* ¶ 10.

[7] *See Regulation of International Accounting Rates*, 6 FCC Rcd 3552 (1991) (expansion of traditional focus of the ISP of preventing whipsawing to include the adverse effect of above-cost levels of accounting rates on U.S. carriers and consumers).

[8] Letter dated July 22, 1993, from Richard C. Beaird, Acting U.S. Coordinator and Director, Bureau of International Communications and Information Policy, U.S. Department of State to FCC Chairman James H. Quello.

[9] Letter dated May 23, 1994, from Richard C. Beaird, Senior Deputy U.S. Coordinator, Bureau of International Communications and Information Policy, U.S. Department of State to FCC Chairman Reed Hundt.

[10] *See* Letter dated July 29, 1994 from Wendell Harris, Assistant Bureau Chief/International, Common Carrier Bureau, to all five applicants.

ment of State, and requested their advice as to whether these new surcharges were in compliance with the Policy Guidelines.[11] On October 3, 1994, we received a letter from the Department of State expressing its views that the new $1.00 per call surcharge was in compliance with the Policy Guidelines.[12] The Department of State stated that the new proposed surcharge of $1.00 per call appears consistent with international norms and practices, relevant ITU Recommendations, and current surcharge rates in the region. The Department of State notes, however, that it hopes that this and other surcharge rates will generally be reduced or eliminated in the future.

14. Upon our own review of the applications, we agree with the Department of State that the five applicants' amended operating agreements with EMTELCUBA are in compliance with the Policy Guidelines. The $1.00 per call surcharge for collect calls is within the range of surcharges that other countries in the Caribbean region have for these types of calls, and reflects the cost to the originating country of providing the service. Accordingly, we find that this new surcharge is reasonable and justified. It is our desire, however, as it is the Department of State's, that this surcharge eventually be reduced or eliminated in the future.

15. In addition, we find AT&T's arguments that the $4.85 per call surcharge is in violation of the ISP to be inapposite. AT&T's arguments were based on the original $4.85 per call surcharge, not the amended $1.00 per call surcharge. Further, we note that AT&T's petition stated that a $1.00 surcharge would be consistent with industry practice. Finally, we have not received any additional pleadings from AT&T arguing that the amended operating agreements are in violation of our ISP.

16. We find that a grant of the above-captioned five applications will serve the public interest subject to the conditions set forth below. These applications are consistent with the Executive Branch's Policy Guidelines. The applicants state that they will initiate service within one year, and expect to initiate service shortly after all requisite regulatory approvals have been obtained. To the extent the applicants propose to use the INTELSAT, Intersputnik, and Columbia satellite facilities and appropriately authorized existing earth station facilities, we find these proposals satisfy the requirement that facilities already be in existence and be limited to equipment and services necessary to deliver a signal to Cuba.

17. Accordingly, IT IS ORDERED that application File No. I-T-C-94-227 IS GRANTED and WilTel is authorized to:

a. lease from Comsat and operate up to 120 64-kbps satellite circuits, and up to two satellite video transmission circuits on an occasional use basis, between an appropriately authorized U.S. international fixed-satellite earth station and the INTELSAT-AOR satellite at 335^0 E.L., together with the necessary domestic connecting facilities between the earth station and WilTel's operating center, connecting with similar circuits between the satellite and an earth station in Cuba, furnished by EMTELCUBA; or

b. in lieu of the INTELSAT circuits, establish up to 120 64-kbps satellite circuits between an appropriately authorized U.S. international fixed-satellite earth station and an appropriate Intersputnik satellite, together with the necessary domestic connecting facilities between the earth station and WilTel's operating center, connecting with similar circuits between the satellite and an earth station in Cuba, furnished by EMTELCUBA; and

c. use the facilities in either (a) or (b) above to provide IMTS and other switched services (including facsimile, data and video transmission services), and international private line services, between the United States and Cuba.

18. IT IS FURTHER ORDERED that application File No. I-T-C-94-228 IS GRANTED and MCI is authorized to:

a. lease from Comsat and operate 150 64-kbps satellite circuits between the Mount Jackson, Virginia earth station and an appropriate INTELSAT-AOR satellite, together with the necessary connecting facilities between the Mt. Jackson earth station and MCI's operating centers at Pottstown, Pennsylvania and San Antonio, Texas, connecting with similar circuits between the satellite and an earth station in Cuba, furnished by EMTELCUBA; and

b. use the above facilities to provide all of MCI's authorized services, including IMTS, between the United States and Cuba.

19. IT IS FURTHER ORDERED that application File No. I-T-C-94-229 IS GRANTED and LDDS is authorized to:

a. lease from Comsat and operate 150 64-kbps satellite circuits between an appropriately authorized U.S. international fixed-satellite earth station and an appropriate INTELSAT-AOR satellite, together with the necessary domestic connecting facilities between the earth station and LDDS's operating center, connecting with similar circuits between the satellite and an earth station in Cuba, furnished by EMTELCUBA; or

b. in lieu of the INTELSAT circuits, establish up to 150 64-kbps satellite circuits, between an appropriately authorized U.S. international fixed-satellite earth station and an appropriate Intersputnik or Columbia satellite, together with the necessary domestic connecting facilities between the earth station and LDDS's operating center, connecting with similar circuits between the satellite and an earth station in Cuba, furnished by EMTELCUBA; and

c. use the facilities in either (a) or (b) above to provide IMTS and private line services between the United States and Cuba.

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[11] *See* Letters dated September 9 and 16, 1994 from Wendell Harris, Assistant Bureau Chief/International, Common Carrier Bureau, to Richard C. Beaird, Senior Deputy U.S. Coordinator, Bureau of International Communications and Information Policy, U.S. Department of State.

[12] Letter dated October 3, 1994, from Richard C. Beaird, Senior Deputy U.S. Coordinator, Bureau of International Communications and Information Policy, U.S. Department of State to FCC Chairman Reed Hundt.

20. IT IS FURTHER ORDERED that application File No. I-T-C-94-247 IS GRANTED and Sprint is authorized to:

a. lease from Comsat and operate one E-1 circuit (30 64-kbps circuits), which can derive 120 virtual voice-grade circuits, between the Orion international Standard A earth station located at Shenandoah, Virginia and the INTELSAT-AOR satellite at 335^0 E.L., together with the necessary connecting facilities between its operating center in New York, New York, and the Orion earth station, connecting with similar circuits between the satellite and an earth station in Cuba, furnished by EMTELCUBA; and

b. use the above facilities to provide all of Sprint's authorized services, including IMTS, between the United States and Cuba.

21. IT IS FURTHER ORDERED that application File No. I-T-C-94-260 IS GRANTED and IDB is authorized to:

a. lease from Comsat and operate one 2 Mbps channel (an E-1 circuit or 30 64-kbps circuits), which can derive 120 virtual voice-grade circuits, between an appropriately authorized U.S. international fixed-satellite earth station and an appropriate INTELSAT-AOR satellite, together with the necessary connecting facilities between the earth station and an operating center in New York, New York, connecting with similar circuits between the satellite and an earth station in Cuba, furnished by EMTELCUBA; or

b. in lieu of the INTELSAT circuits, establish up to one 2 Mbps channel (an E-1 circuit or 30 64-kbps circuits), which can derive 120 virtual voice-grade circuits, between an appropriately authorized U.S. international fixed-satellite earth station and the Intersputnik satellite located at 14^0 W.L. ("Statsionar 4"), together with the necessary connecting facilities between the earth station and an operating center in New York, New York, connecting with similar circuits between the satellite and an earth station in Cuba, furnished by EMTELCUBA; and

c. use the facilities in either (a) or (b) above to provide IMTS services between the United States and Cuba.

22. IT IS FURTHER ORDERED that the services authorized herein must be implemented within one year from the date of release of this order.

23. IT IS FURTHER ORDERED that WilTel, MCI, LDDS, Sprint and IDB shall split 50/50 with EMTELCUBA the $1.20 per minute accounting rate for the IMTS services.

24. IT IS FURTHER ORDERED that the surcharge agreed to between the applicants and EMTELCUBA for received collect calls shall be no greater than $1.00 per call.

25. IT IS FURTHER ORDERED that the applicants shall submit reports on or before June 30, and December 31 of each year, and on the one-year anniversary of the notification of the grant of these applications in the Federal Register indicating the numbers of circuits activated by facility.

26. IT IS FURTHER ORDERED that this authorization is subject to the applicants' obtaining all necessary licenses and authorizations from the Departments of Treasury and Commerce.

27. IT IS FURTHER ORDERED that this order is subject to revocation without a hearing in the event the Department of State or the Federal Communications Commission determines that the continuation of communications between the United States and Cuba is no longer in the national interest.

28. IT IS FURTHER ORDERED that our authorization for the applicants to provide private lines is limited to the provision of such private lines only between the United States and Cuba -- that is, private lines which originate in the United States and terminate in Cuba or which originate in Cuba and terminate in the United States. In addition, the applicants may not -- and applicants' tariffs must state that their customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that its correspondents afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991), *Order on Reconsideration and Third Further NPRM*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

29. IT IS FURTHER ORDERED that, pursuant to Section 203 of the Communications Act, 47 U.S.C. § 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, the applicants shall file and have in effect a tariff for the services authorized in this order before offering services to the public.

30. IT IS FURTHER ORDERED that the applicants shall file copies of any operating agreements entered into by themselves or their parent/affiliates with their correspondents within 30 days of their execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51.

31. IT IS FURTHER ORDERED that the applicants shall file annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61.

32. IT IS FURTHER ORDERED that the applicants shall file a Section 214 application for any additional circuits they propose to establish between the United States and Cuba.

33. Acceptance of this authorization shall be deemed acceptance of the conditions set forth herein.

34. IT IS FURTHER ORDERED that the Petitions to Deny against each applicant filed by AT&T ARE DENIED.

35. This authorization is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TKR CABLE COMPANY	Wildwood
	Elizabeth
	Hamilton
	Old Bridge
	Ramapo
Petition for Stay of Rate Orders	Rockland
of State of New Jersey	Tri-System
Board of Public Utilities	Warwick

ORDER

Adopted: October 5, 1994; Released: October 6, 1994

By the Chief, Cable Services Bureau:

1. TKR Cable Company ("TKR"), the franchisee in the instant case, filed on August 31, 1994, an Emergency Petition for Stay and Request for Ex Parte Disposition ("Stay Petition") of a series of eight local rate orders adopted by its franchising authority, the New Jersey Board of Public Utilities, Office of Cable Television ("the Board") on August 17, 1994.[1] TKR also filed with the Commission a Petition for Review ("Appeal") of the local franchising authority's rate orders on August 31, 1994. The Board filed an opposition to TKR's Appeal and Stay Petition on September 21, 1994.[2] The local rate orders in question establish new rate schedules for TKR's basic service tier and associated equipment, and direct TKR to issue refunds to subscribers for charges in excess of the newly established rates between September 1, 1993 and the date TKR implements a new rate structure in accordance with the terms of the orders.[3] The sole issue raised by TKR in its Stay Petition[4] centers on the regulatory treatment of TKR's a la carte package offerings in each of the eight systems.

2. The Commission has issued numerous Letters of Inquiry to cable operators regarding the regulatory treatment of a la carte offerings. TKR's a la carte package offered on its Hamilton system is the subject of a Letter of Inquiry currently pending before the Commission.[5] However, none of the other seven systems involved in this appeal is subject to a Letter of Inquiry. Despite the absence of a Letter of Inquiry being issued with respect to the a la carte packages offered in those systems, we will grant TKR's Stay Petition for all eight systems, pending the resolution of its appeal on the merits.[6] We grant thisrequest in order to minimize subscriber confusion and ensure regulatory consistency in this important area, as the Commission has done in other similar cases.[7]

3. During the period of this stay, TKR is ordered to deposit in an interest-bearing escrow account the total amount of money that the Board has ordered TKR to refund to its customers. Alternatively, TKR may elect to post a bond for the benefit of the Board. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. The bond shall provide that if TKR is unable to fulfill its refund obligations for any reason, then the surety will fulfill that obligation to the Board, on behalf of TKR's subscribers.[8]

4. Accordingly, IT IS ORDERED that the local rate orders adopted by the New Jersey Board of Public Utilities, Office of Cable Television for TKR's Elizabeth, Hamilton, Old Bridge, Ramapo, Rockland, Tri-System, Warwick and Wildwood systems are STAYED pending the resolution of TKR Cable Company's Appeal.

5. IT IS FURTHER ORDERED that the amount of the refunds required by the New Jersey Board of Public Utilities' rate orders SHALL BE PLACED by TKR Cable Company in an interest-bearing escrow account, OR SHALL

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[1] The eight TKR systems affected by the local rate orders include: Elizabeth, Hamilton, Old Bridge, Ramapo, Rockland, Tri-System, Warwick, and Wildwood.

[2] By letter dated September 2, 1994, the parties informed the Commission of a mutually agreed to extension of time. In exchange for the Board's granting an extension of the compliance date to October 6, 1994, TKR agreed to allow the Board until September 21, 1994 to respond to its petitions for stay and appeal.

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service and associated equipment. *See* Cable Television Consumer Protection and competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b) (1993).

[4] TKR filed a Withdrawal of GNP-PI Portions of Petition for Stay and a Partial Withdrawal of Petition for Review with the Commission on September 14, 1994. Because TKR asserts that the Board should not have addressed this issue in its opposition filings, TKR also filed a Motion to Strike GNP-PI Portions of Opposition to Petition for Stay and a Motion to Strike GNP-PI Portions of Opposition to Petition for Review. We hereby grant TKR's motion for partial withdrawal regarding the GNP-PI issue and therefore we withhold consideration of the subject in this Order.

[5] Letter of Inquiry to TKR Cable Company of Hamilton, NJ, File No. LOI-93-31 (December 13, 1994).

[6] Each system has different a la carte packages that vary in both quantity of channels and price. Each package involves 3 to 5 channels that were previously offered as part of either the Basic or CPS tiers. The package prices vary between $2.00 and $4.00 with the price of each individual channel offering falling between $0.65 and $1.00. With the exception of one system, an equipment charge is also incurred to receive less than the entire package. Although we are granting the stay request applicable to each of the eight separate Rate Orders in this one consolidated order, we wish to make clear that we will not necessarily consolidate our decision on appeal and we will evaluate each a la carte package on its own merits.

[7] See, *Paragon Cable of Southern California* (Brea, CA), DA 94-512 (Rel. May 17, 1994); *Paragon Cable of Southern California* (La Habra, CA), DA 94-513 (Rel. May 17, 1994); *Warner Cable Communications, Inc.* (Wadsworth, OH), DA 94-511 (Rel. May 17, 1994).

[8] See, *Comcast Cablevision of Tallahassee, Inc.*, DA 94-1071 (Rel. September 30, 1994), in which the Commission authorizes the operator to post a bond in lieu of establishing an escrow account.

BE SECURED by the posting of a bond for the benefit of the Board for the amount of money the Board has ordered TKR to refund, plus interest. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. Proof of TKR's compliance with this Order shall be filed with the Commission within thirty (30) days of the release of this Order. Interest shall accrue, or be computed, at the prevailing U.S. Internal Revenue Service Rate.

6. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CENTURY CABLE MANAGEMENT CORPORATION	East Haddam, CT Haddam, CT Lyme, CT
Emergency Petition for Stay of Local Rate Order of the Connecticut Department of Public Utility Control	Old Lyme, CT Salem, CT

ORDER

Adopted: October 5, 1994; Released: October 6, 1994

By the Chief, Cable Services Bureau:

1. Century Cable Management Corporation ("Century") filed on August 26, 1994, an Emergency Petition for a Stay of Enforcement Pending Review ("Petition") of the local rate order adopted by the Connecticut Department of Public Utility Control ("DPUC") on August 17, 1994.[1] The DPUC did not submit any pleadings in opposition to Century's Petition. The local rate order in question establishes a new rate schedule for Century's basic service tier,[2] and directs Century to issue refunds to subscribers for those charges since September 1, 1993 which were in excess of the newly established rates.[3] The main issue raised by Century in its Petition centers on the proper regulatory treatment of Century's a la carte package offerings.

2. The Commission has issued numerous Letters of Inquiry to cable operators regarding the regulatory treatment of a la carte offerings. While a Letter of Inquiry has not been issued to the operator in this case, we will grant Century's Petition pending the resolution of its Appeal, in order to minimize subscriber confusion and ensure regulatory consistency in this important area, as the Commission has done in other similar cases.[4]

3. During the period of this stay, Century is ordered to deposit in an interest-bearing escrow account the total amount of money that the DPUC has ordered Century to refund to its customers. Alternatively, Century may elect to post a bond for the benefit of the DPUC. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. The bond shall provide that if Century is unable to fulfill its refund obligations for any reason, then the surety will fulfill that obligation to the DPUC, on behalf of Century's subscribers.[5]

4. Accordingly, IT IS ORDERED that the local rate order adopted by the Connecticut Department of Public Utility Control for the Communities is STAYED pending the resolution of Century CableManagement Corporation's Petition for Review. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

5. IT IS FURTHER ORDERED that the amount of the refunds required by the Connecticut Department of Public Utility Control's local rate order SHALL BE PLACED by Century Cable Management Corporation in an interest-bearing escrow account, OR SHALL BE SECURED by the posting of a bond for the benefit of the Connecticut Department of Public Utility Control for the amount of money the Connecticut Department of Public Utility Control has ordered Century Cable Management Corporation to refund, plus interest. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. Proof of Century Cable Management Corporation's compliance with this Order shall be filed with the Commission within thirty (30) days of the release of this Order. Interest shall accrue, or be computed, at the prevailing U.S. Internal Revenue Service Rate.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] Century also filed a Petition for Review of the DPUC's local rate order on September 16, 1994. The DPUC filed an Opposition to Century's Petition for Review on October ___, 1994.

[2] The communities in Connecticut which are affected by the local rate order are the following: East Haddam; Haddam; Lyme; Old Lyme; and Salem ("Communities").

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment and installations. *See* Cable Television Consumer Protection and competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b) (1993).

[4] See, *Century Cable of Southern California* (Brea, CA), DA 94-512 (Rel. May 17, 1994); *Century Cable of Southern California* (La Habra, CA), DA 94-513 (Rel. May 17, 1994); *Warner Cable Communications, Inc.* (Wadsworth, OH), DA 94-511 (Rel. May 17, 1994); and *Paragon Cable* (Grapevine, TX), DA 94-1072 (Rel. September 30, 1994).

[5] See, *Comcast Cablevision of Tallahassee, Inc.*, DA 94-1071 (Rel. September 30, 1994), in which the Commission authorizes the operator to post a bond in lieu of establishing an escrow account.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CENTURY NORWICH CORPORATION	Bozrah, CT
	Colchester, CT
	Franklin, CT
Emergency Petition	Lisbon, CT
for Stay of Local	Norwich, CT
Rate Order of the Connecticut	Preston, CT
Department of Public Utility Control	Sprague, CT

ORDER

Adopted: October 5, 1994; Released: October 6, 1994

By the Chief, Cable Services Bureau:

1. Century Norwich Corporation ("Century") filed on August 26, 1994, an Emergency Petition for a Stay of Enforcement Pending Review ("Petition") of the local rate order adopted by the Connecticut Department of Public Utility Control ("DPUC") on August 17, 1994.[1] The DPUC did not submit any pleadings in opposition to Century's Petition. The local rate order in question establishes a new rate schedule for Century's basic service tier,[2] and directs Century to issue refunds to subscribers for those charges since September 1, 1993 which were in excess of the newly established rates.[3] The main issue raised by Century in its Petition centers on the proper regulatory treatment of Century's a la carte package offerings.[4]

2. The Commission has issued numerous Letters of Inquiry to cable operators regarding the regulatory treatment of a la carte offerings. While a Letter of Inquiry has not been issued to the operator in this case, we will grant Century's Petition pending the resolution of its Appeal, in order to minimize subscriber confusion and ensure regulatory consistency in this important area, as the Commission has done in other similar cases.[5]

3. During the period of this stay, Century is ordered to deposit in an interest-bearing escrow account the total amount of money that the DPUC has ordered Century to refund to its customers. Alternatively, Century may elect to post a bond for the benefit of the DPUC. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. The bond shall provide that if Century is unable to fulfill its refund obligations for any reason, then the surety will fulfill that obligation to the DPUC, on behalf of Century's subscribers.[6]

4. Accordingly, IT IS ORDERED that the local rate order adopted by the Connecticut Department of Public Utility Control for the Communities is STAYED pending the resolution of Century Norwich Corporation's Petition for Review. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

5. IT IS FURTHER ORDERED that the amount of the refunds required by the Connecticut Department of Public Utility Control's local rate order SHALL BE PLACED by Century Norwich Corporation in an interest-bearing escrow account, OR SHALL BE SECURED by the posting of a bond for the benefit of the Connecticut Department of Public Utility Control for the amount of money the Connecticut Department of Public Utility Control has ordered Century Norwich Corporation to refund, plus interest. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. Proof of Century Norwich Corporation's compliance with this Order shall be filed with the Commission within thirty (30) days of the release of this Order. Interest shall accrue, or be computed, at the prevailing U.S. Internal Revenue Service Rate.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

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[1] Century also filed a Petition for Review of the DPUC's local rate order on September 16, 1994. The DPUC filed an Opposition to Century's Petition for Review on October ___, 1994.

[2] The communities in Connecticut which are affected by the local rate order are the following: Bozrah; Colchester; Franklin; Lisbon; Norwich; Preston; and Sprague ("Communities").

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment and installations. *See* Cable Television Consumer Protection and competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b) (1993).

[4] Century also contends that the DPUC erroneously established two different initial basic service tier rates (September 1, 1993 - March 31, 1994; and April 1, 1994 - July 14, 1994) in order to reflect the addition of certain channels which were added to Century's system on March 31, 1994. It is Century's position that since these channels were added to the system after the initial date of regulation, they should be treated as "going forward" channels which will be accounted for on Century's Form 1200.

[5] See, *Century Cable of Southern California* (Brea, CA), DA 94-512 (Rel. May 17, 1994); *Century Cable of Southern California* (La Habra, CA), DA 94-513 (Rel. May 17, 1994); *Warner Cable Communications, Inc.* (Wadsworth, CA), DA 94-511 (Rel. May 17, 1994); and *Paragon Cable* (Grapevine, TX), DA 94-1072 (Rel. September 30, 1994).

[6] See, *Comcast Cablevision of Tallahassee, Inc.*, DA 94-1071 (Rel. September 30, 1994), in which the Commission authorizes the operator to post a bond in lieu of establishing an escrow account.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TIME WARNER ENTERTAINMENT	Litchfield, CT
COMPANY, L.P., d/b/a LAUREL	Morris, CT
CABLEVISION	Thomaston, CT
	Torrington, CT
Emergency Petition	Warren, CT
for Stay of Local	Watertown, CT
Rate Order of the Connecticut	
Department of Public Utility Control	

ORDER

Adopted: October 5, 1994; Released: October 6, 1994

By the Chief, Cable Services Bureau:

1. Time Warner Entertainment Company, L.P., d/b/a Laurel Cablevision ("Laurel"), the franchisee in the above matter, filed on September 23, 1994, an Emergency Petition for a Stay of Enforcement Pending Review ("Petition") of the local rate order adopted by the Connecticut Department of Public Utility Control "("DPUC") on August 24, 1994.[1] The DPUC did not submit any pleadings in opposition to Laurel's Petition. The local rate order in question establishes a new rate schedule for Laurel's basic service tier, associated equipment, and installaltions,[2] and directs Laurel to issue refunds to subscribers for those charges since September 1, 1993 which were in excess of the newly established rates.[3] The main issue raised by Laurel in its Petition centers on the proper regulatory treatment of Laurel's a la carte package offerings.

2. The Commission has issued numerous Letters of Inquiry to cable operators regarding the regulatory treatment of a la carte offerings. While a Letter of Inquiry has not been issued to the operator in this case, we will grant Laurel's Petition pending the resolution of its Appeal, in order to minimize subscriber confusion and ensure regulatory consistency in this important area, as the Commission has done in other similar cases.[4]

3. During the period of this stay, Laurel is ordered to deposit in an interest-bearing escrow account the total amount of money that the DPUC has ordered Laurel to refund to its customers. Alternatively, Laurel may elect to post a bond for the benefit of the DPUC. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. The bond shall provide that if Laurel is unable to fulfill its refund obligations for any reason, then the surety will fulfill that obligation to the DPUC, on behalf of Laurel's subscribers.[5]

4. Accordingly, IT IS ORDERED that the local rate order adopted by the Connecticut Department of Public Utility Control for the Communities is STAYED pending the resolution of Time Warner Entertainment Company, L.P., d/b/a Laurel Cablevision's Petition for Review. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by Section 0.321 of the Commission's rules. 47 C.F.R. § 0.321.

5. IT IS FURTHER ORDERED that the amount of the refunds required by the Connecticut Department of Public Utility Control's local rate order SHALL BE PLACED by Time Warner Entertainment Company, L.P., d/b/a Laurel Cablevision in an interest-bearing escrow account, OR SHALL BE SECURED by the posting of a bond for the benefit of the Connecticut Department of Public Utility Control for the amount of money the Connecticut Department of Public Utility Control has ordered Time Warner Entertainment Company, L.P., d/b/a Laurel Cablevision to refund, plus interest. The amount of the bond shall be the total amount of money subject to the refund order, plus interest on that amount for a twelve (12) month period from the date of this Order. Proof of Time Warner Entertainment Company, L.P., d/b/a Laurel Cablevision's compliance with this Order shall be filed with the Commission within thirty (30) days of the release of this Order. Interest shall accrue, or be computed, at the prevailing U.S. Internal Revenue Service Rate.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

[1] Century also filed a Petition for Review of the DPUC's local rate order on September 23, 1994.

[2] The communities in Connecticut which are affected by the local rate order are the following: Litchfield, Morris, Thomaston, Torrington, Warren and Watertown ("Communities").

[3] Under the Cable Television Consumer Protection and Competition Act of 1992 and the Commission's implementing regulations, local franchising authorities may regulate rates for basic cable service, associated equipment and installations. *See* Cable Television Consumer Protection and competition Act, Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act, § 623(b), *as amended*, 47 U.S.C. § 543(b) (1993).

[4] See, *Century Cable of Southern California* (Brea, CA), DA 94-512 (Rel. May 17, 1994); *Century Cable of Southern California* (La Habra, CA), DA 94-513 (Rel. May 17, 1994); *Warner Cable Communications, Inc.* (Wadsworth, OH), DA 94-511 (Rel. May 17, 1994); and *Paragon Cable* (Grapevine, TX), DA 94-1072 (Rel. September 30, 1994).

[5] See, *Comcast Cablevision of Tallahassee, Inc.*, DA 94-1071 (Rel. September 30, 1994), in which the Commission authorizes the operator to post a bond in lieu of establishing an escrow account.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-40

In the Matter of

Amendment of Section 73.202(b) RM-8456
Table of Allotments,
FM Broadcast Stations.
(Bamberg, South Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 6, 1994; Released: October 14, 1994

By the Acting Chief, Allocations Branch:

1. At the request of Branch Communications ("petitioner"), licensee of Station WWBD(FM), Channel 221A, Bamberg, South Carolina, the Commission has before it the *Notice of Proposed Rule Making*, 9 FCC Rcd 2181 (1994), proposing the substitution of Channel 239A for Channel 221A at Bamberg, and the modification of Station WWBD(FM)'s license accordingly. Petitioner filed comments in support of the proposal reaffirming its intention to apply for the channel, if allotted. No other comments were received.[1]

2. In support of its proposal, petitioner states that at its presently licensed site, Station WWBD(FM) does not meet the Commission's minimum spacing requirements for maximum Class A FM facilities of six kilowatts with an antenna height of 100 meters above the average terrain. Petitioner claims that the substitution of Channel 239A for Channel 221A at Bamberg would enable Station WWBD(FM) to operate at six kilowatts and serve a larger area, thereby increasing the number of broadcast services available to the public in the area, and thus promoting efficient use of the broadcast spectrum.

3. We believe the public interest would be served by substituting Channel 239A for Channel 221A, since it would enable Station WWBD(FM) to provide Bamberg with an improved FM service. An engineering analysis has confirmed that Channel 239A can be allotted to Bamberg in compliance with the Commission's minimum distance separation requirements at the petitioner's presently licensed site.[2] We also modify petitioner's license for Station WWBD(FM) to specify operation on Channel 239A at Bamberg.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1),3(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 28, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Bamberg, South Carolina	239A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Branch Communications for Station WWBD(FM), Bamberg, South Carolina, IS MODIFIED to specify operation on Channel 239A in lieu of Channel 221A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station WWBD(FM)'s license, BLH-850605KA, except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-850605KA, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 418-2780.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In conformance with the Commission's general policy of accepting late-filed comments where the proceeding is uncontested, we have accepted petitioner's comments for the purpose of allowing petitioner to reaffirm its interest in applying for Channel 239A at Bamberg. *See Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988).

[2] The coordinates for Channel 239A at Bamberg are North Latitude 33-18-50 and West Longitude 81-04-43.

Before the
Federal Communications Commission
Washington, D.C.20554

In the Matter of DA 94-1181

NATIONWIDE WIRELESS NETWORK CORP.

For a Nationwide Authorization
in the Narrowband Personal
Communications Service

ERRATUM

This document corrects the FCC Record at 9 FCC Rcd 3635. The separate statement of Commissioner Susan Ness was partially omitted.

FEDERAL COMMUNICATIONS COMMISSION

SEPARATE STATEMENT
OF
COMMISSIONER SUSAN NESS

Re: *Award of Narrowband PCS License to Mtel Corporation*

Today we award a narrowband PCS license to Mtel but impose a payment obligation upon the licensee. This decision reflects a careful balancing of competing interests and a conscientious effort to meet our statutory obligation to serve the public interest, convenience, and necessity.

This is the first substantive Commission decision involving pioneer's preferences in which I have participated. Although the creation of the pioneer's preference program and the decision to award a pioneer's preference to Mtel both predated my arrival, I have thought it important for the Commission to maintain a sense of continuity. For this reason, I firmly support the issuance of a license to Mtel, one which grants it the recognition and the opportunity to participate in the narrowband PCS market that was promised.

Yet our public interest responsibilities also require that other factors be considered. Subsequent to the award of a final pioneer's preference to Mtel, Congress enacted legislation which requires that competitive bidding be used to resolve mutually exclusive license applications for services such as narrowband PCS. As a consequence of the Commission's earlier ruling, Mtel's application is not subject to mutually exclusive applications, but we cannot ignore the adverse consequences that could result from awarding one of several licenses without payment while requiring that other parties pay what could be substantial sums for their licenses.

As I reviewed the circumstances and the history of legislative and administrative actions in this area, I reached several conclusions. First, enactment of the auction legislation fundamentally altered the significance of the pioneer's preference grant and the potential relationship among competitors in the narrowband PCS market. Second, there was nothing in the legislation or its legislative history to suggest that the Congress intended to create substantial competitive disparities between successful bidders and recipients of pioneer's preferences. Third, the adverse competitive effects of awarding a single party a license without payment increase as the value of the license itself increases. Fourth, complete exemption from a payment obligation could result in a pioneer being unjustly enriched by Commission action bestowing valuable rights which may be arbitrarily disproportionate to any public benefits resulting from efforts undertaken in response to the inducement of the pioneer's preference program. Fifth, the Commission has not only the authority but also the duty to determine whether a pioneer's preference license should be awarded unconditionally or

subject to conditions.

From these premises, and the totality of circumstances, I believe our decision to impose a payment requirement (along with other requirements set forth in the order) is necessary to meet our public interest responsibility. I further conclude that it is essential to structure the payment condition in a manner which provides for competitive balance in the narrowband PCS market, avoids giving any party what could be an insurmountable advantage over those who obtain their licenses through the auction process, minimizes the prospect of unjust enrichment, and otherwise deals responsibly with the disposition of a valuable public resource.

The structure of our payment requirement, with elements of absolute discount and percentage discount, holds out the possibility that Mtel will secure its license without payment if the market value of that license, as determined by the auction of other narrowband PCS licenses, is $3 million or less. If the value of the license is greater, between $3 and $30 million, Mtel will still enjoy a significant discount from the market price. Even if the value of the license proves to be in excess of $30 million, Mtel will reap the reward of a 10 percent discount. This approach reflects the shifting balance of equities in the complex circumstances of this unique case.

I believe the approach we adopt today resolves the issues in a manner which is fair to all parties, fosters the rapid development of robust competition in the narrowband PCS market, and comports with our statutory mandate.

PUBLIC NOTICE

FEDERAL COMMUNICATIONS COMMISSION
1919 M STREET N.W.
WASHINGTON, D.C. 20554

44307

News media information 202/632-5050. Recorded listing of releases and texts 202/632-0002.

DA 94-856

Released: August 12, 1994

Comment Date: September 2, 1994
Reply Comment Date: September 16, 1994

COMMENTS INVITED ON DEPRECIATION RATE PRESCRIPTIONS PROPOSED FOR DOMESTIC TELEPHONE CARRIERS.

The Common Carrier Bureau invites comments on proposed depreciation rates and amortizations for 13 local exchange carriers and AT&T. The proposed rates for these carriers were developed in conjunction with the Commission's standard review procedures.

Each of the 14 carriers submitted studies to the Commission in support of its proposed depreciation rates. The carriers' submissions were reviewed by the staffs of the state public utility commissions and the Common Carrier Bureau. The carriers' studies and the corresponding staff reviews were discussed in correspondence, telephone conversations, and/or conferences. Each of the carriers thereafter formally filed updated studies which contained the data required by Section 43.43 of the Commission's rules. The rates filed by the carriers are consistent with those proposed by the Bureau staff for all carriers.

The Attachment lists the 14 carriers, and the affected jurisdictions. This Attachment also lists the proposed expenses and composite rates for the carriers, the current expenses and composite rates (developed using the currently prescribed depreciation rates and amortizations), and the percentage change in expenses (proposed vs. current).

The Bureau staff is recommending the life, salvage, and curve shape parameters which underlie the expenses and composite rates shown on the Attachment. These expenses are estimated annual amounts and may not reflect actual expenses because January 1, 1994 plant balances are used and the proposed rates may not be applicable for the entire year.

Copies of the carriers' initial 1994 depreciation rate study submissions, the Bureau staff's preliminary reports on these submissions, the rate filings and other data supporting the proposed rates are available for public inspection in Suite 257, 2000 L Street, N.W., Washington, D.C. Copying facilities are available in Suite 812, 2000 L Street, N.W. Copies are also available from the International Transcription Service, Inc., Room 246, 1919 M Street, N.W., Washington, D.C.

Parties wishing to file comments on the proposals summarized herein may do so by September 2, 1994. Replies may be filed by September 16, 1994. Comments and reply comments should include in the caption a reference to file no. AAD 94-101. A copy of the comments and replies should be provided to the Chief, Depreciation Rates Branch.

We will treat this proceeding as non-restricted for purposes of the ex parte rules. See generally 47 C.F.R. § 1.1200-1.1216.

For additional information contact Ms. Fatina Franklin, Chief, Depreciation Rates Branch, 202-632-7500.

Attachment

SUMMARY OF PROPOSED CHANGES IN ANNUAL DEPRECIATION EXPENSE BY JURISDICTION

Carrier - Jurisdiction	Investment	Annual Depreciation Expense and Composite Rate					
		Current		Proposed		Proposed Change	
		Expense	Percent	Expense	Percent	Expense	Percent
	($000)	($000)	(%)	($000)	(%)	($000)	(%)
AT&T COMMUNICATIONS, INC.	22,626,624	2,335,726	10.3	2,587,960	11.4	252,234	10.8
AMERITECH-ILLINOIS	7,968,177	507,763	6.4	627,630	7.9	119,867	23.6
BELL ATLANTIC-DELAWARE	658,488	43,253	6.6	54,789	8.3	11,536	26.7
BELL ATLANTIC-NEW JERSEY	7,936,063	551,883	7.0	654,391	8.2	102,508	18.6
CINCINNATI BELL							
Kentucky	242,711	15,755	6.5	20,272	8.4	4,517	28.7
Ohio	1,104,436	75,031	6.8	89,590	8.1	14,559	19.4
CITIZENS UTILITIES OF CALIFORNIA	256,146	16,318	6.4	16,902	6.6	584	3.6
CONTEL OF NEW YORK, INC.	531,311	35,442	6.7	37,905	7.1	2,463	6.9
GTE MIDWEST							
Iowa	530,120	35,164	6.6	34,524	6.5	(640)	-1.8
Minnesota	7,514	444	5.9	441	5.9	(3)	-0.7
Missouri	855,867	54,179	6.3	54,194	6.3	15	0.0
Nebraska	90,542	4,666	5.2	5,331	5.9	665	14.3
GTE NORTH							
Illinois	1,569,806	95,886	6.1	102,420	6.5	6,534	6.8
Michigan	1,277,961	77,384	6.1	83,513	6.5	6,129	7.9
GTE SOUTH							
Kentucky	1,071,106	70,638	6.6	79,810	7.5	9,172	13.0
North Carolina	670,303	43,381	6.5	49,317	7.4	5,936	13.7
GTE NORTHWEST							
Idaho	286,407	18,447	6.4	20,108	7.0	1,661	9.0
Oregon	739,990	45,272	6.1	47,548	6.4	2,276	5.0
Washington	1,685,283	105,532	6.3	131,820	7.8	26,288	24.9
NEVADA BELL	440,572	27,223	6.2	28,777	6.5	1,554	5.7
PACIFIC BELL	23,937,261	1,600,207	6.7	1,635,935	6.8	35,728	2.2
U S WEST-Central States							
Arizona	3,532,970	233,641	6.6	267,284	7.6	33,643	14.4
Colorado	4,463,042	305,083	6.8	373,732	8.4	68,649	22.5
New Mexico	1,426,498	101,705	7.1	114,913	8.1	13,208	13.0
Utah	1,578,797	99,907	6.3	125,578	8.0	25,671	25.7
Wyoming	702,080	41,547	5.9	54,138	7.7	12,591	30.3
TOTAL	86,190,075	6,541,477	7.6	7,298,822	8.5	757,345	11.6

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ELECTRIC PLANT BOARD OF THE CITY OF GLASGOW, KENTUCKY

v. CSR-4188-P

TURNER CABLE NETWORK SALES, INC.

Program Access Complaint Pursuant to 47 C.F.R. Section 76.1002 Relating to Provision of Turner Network Television

MEMORANDUM OPINION AND ORDER

Adopted: September 2, 1994; Released: September 6, 1994

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. The Commission has before it a program access complaint ("Complaint") filed by the Electric Plant Board of the City of Glasgow, Kentucky ("Glasgow"), a cable operator serving Glasgow, Kentucky.[1] Glasgow alleges that the conduct of Defendant Turner Cable Network Sales, Inc. ("Turner") in refusing to provide to Glasgow the Turner Network Television programming service ("TNT"), violates § 76.1002 of the Commission's rules.[2] Specifically at issue is an existing contract between Turner Network Television, Inc. ("TNT, Inc.") and Scripps Howard Cable Company ("Scripps Howard") to provide TNT in Glasgow, Kentucky. Turner, a vertically integrated satellite cable programming vendor, serves as agent for TNT, Inc. under this contract.[3] Scripps Howard provides the TNT service in Glasgow, Kentucky, through a cable system it owns and operates there, Telescripps Cable Company of Glasgow ("Telescripps").[4] Glasgow asks that the Commission require Turner to make TNT available to Glasgow.[5] Turner answers that the Scripps Howard/Turner contract is "grandfathered" pursuant to the *Cable Television Consumer Protection and Competition Act of 1992* (the "*1992 Cable Act*")[6] and §76.1002(e)(1) of the Commission's implementing rules, because it provides for exclusivity to Scripps Howard in the provision of TNT, and because it was entered into before June 1, 1990.[7] Therefore, Turner claims, the contract is not subject to the Commission's program access regulations. Turner asks that the Commission dismiss Glasgow's complaint with prejudice and award Turner its costs and attorney's fees.[8] Glasgow believes the contract is not "grandfathered."

2. Based on the pleadings submitted, the Bureau has determined that Glasgow's complaint should be dismissed because the contract is "grandfathered" under the *1992 Cable Act*, and thus is not subject to the Commission's program access regulations. The contract was entered into before June 1, 1990, was not renewed or extended after the *1992 Cable Act* was enacted,[9] and is, in fact, exclusive. In addition, the Bureau denies Turner's request for costs and fees. While this determination thus leaves the contract in force, we note that when it expires on October 31, 1994, the program access regulations require Turner to negotiate with Glasgow to provide TNT on non-discriminatory terms and conditions, or to petition the Commission for a finding that exclusivity for TNT is in the public interest.[10]

II. BACKGROUND, AND SUMMARY OF PLEADINGS

3. The *1992 Cable Act* and the Commission's rules prevent a cable operator from entering into any exclusive contract for satellite cable programming with a satellite cable programming vendor in which a cable operator has an attributable interest with respect to areas served by a cable operator, unless the Commission determines that such contract is in the public interest.[11]

4. In addition, 47 C.F.R. § 76.1002(e)(1) provides:

> Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into [on] or before June 1, 1990[.]

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[1] Complaint at 1. Glasgow's complaint, served December 30, 1993, was filed January 6, 1994 and placed on public notice January 26, 1994. Turner filed its answer January 31, 1994. Glasgow did not file a reply. Copies of these documents are available to the public in the Commission's Public Reference Center; 1919 M St., NW, Room 242; Washington, D.C. 20554.

[2] Complaint at 3-4. *See* 47 C.F.R. § 76.1002. *See also* § 628 of the Communications Act of 1934, *as amended*, 47 U.S.C. § 548.

[3] Answer to Program Access Complaint ("Answer") at 1-3.

[4] Answer at 2-3.

[5] Complaint at 5.

[6] Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[7] §628(h)(1) of the Communications Act of 1934, *as amended*, 47 U.S.C. § 548(h)(1), provides "Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into on or before June 1, 1990[.]" *See also* 47 C.F.R. §76.1002(e)(1).

[8] Answer at 6.

[9] § 628(h)(2) of the Communications Act of 1934, *as amended*, 47 U.S.C. § 548(h)(2), provides "A contract that was entered into on or before June 1, 1990, but that is renewed or extended after the date of enactment of this section shall not be exempt under paragraph (1)." The *1992 Cable Act* was enacted on October 5, 1992. *See also* 47 C.F.R. § 76.1002(e)(2), providing that "A contract that was entered into on or before June 1, 1990, but that was renewed or extended after October 5, 1992, shall not be exempt under paragraph (e)(1) of this section."

[10] *See* 47 U.S.C. § 548(h)(2); *see also* 47 C.F.R. § 76.1002(e)(2).

[11] *See* 47 U.S.C. § 548(c)(2)(D); *see also* 47 C.F.R. §76.1002(c)(2). 47 C.F.R. § 76.1002(c)(5) provides: "Any . . . satellite cable programming vendor in which a cable operator has an attributable interest . . . seeking to enforce or enter into an exclusive contract in an area served by a cable operator must submit a 'Petition for Exclusivity' to the Commission for approval."

5. On October 3, 1988 Turner, as agent for TNT, Inc. in the performance of contracts for the provision of TNT,[12] entered into a three year contract[13] with Scripps Howard to provide TNT in Glasgow, Kentucky through Telescripps.[14] Georgia law governs the contract.[15]

6. The outcome of this dispute depends on resolution of two issues related to the October 3, 1988 Scripps Howard/Turner contract. The first issue is whether or not the contract was renewed or extended after the *1992 Cable Act* was enacted. The second issue is whether or not this contract actually provides exclusivity to Scripps Howard for the TNT programming. If the contract was renewed or extended after October 5, 1992, or if it is not in fact exclusive, then it cannot be brought within the protection of the statute's "grandfathering" clause.

7. *Renewed or Extended Issue.* While the parties originally entered into the subject contract on October 3, 1988, the contract was amended by the parties on August 27, 1990.[16] By the amendment's terms, the contract term was extended to "expire on October 31, 1994."[17] The amendment, governed by Georgia law, also provided that the contract "shall, except as modified herein, remain in full force and effect."[18]

8. There is no dispute that neither the contract nor the amendment has been determined by the Commission to be in the public interest, and no dispute as to whether Turner has petitioned the Commission for exclusivity--it has not. Turner argues, however, that "its denial of Glasgow's requests for TNT affiliation were proper and lawful in all respects" because "exclusive agreements entered into on or before June 1, 1990 and renewed or extended by October 5, 1992 are grandfathered agreements."[19] Moreover, 47 U.S.C. § 548(h)(2) provides that "[a] contract that was entered into on or before June 1, 1990, but that is renewed or extended after the date of enactment of this section [October 5, 1992] shall not be exempt[.]"[20] Thus, Turner argues that because the August 27, 1990 amendment predates the effective date of the *1992 Cable Act*, the contract (assuming, of course, that it is in fact exclusive) is clearly "grandfathered" under the statute and the Commission's implementing rules.

9. Glasgow claims the contract is not exempt as "grandfathered" and that Turner's exclusionary behavior toward Glasgow, absent a finding by the Commission that exclusivity is in the public interest pursuant to 47 U.S.C. §548(c)(2)(D),[21] gives rise to a program access complaint. Glasgow argues that the August 27, 1990 "amendment" created a new contract as of that date--a date post-dating the June 1, 1990 operative date for exemptions under 47 U.S.C. § 548(h)(1) and 47 C.F.R. § 76.1002(e)(1), and concludes that the "[d]efendant's conduct in refusing to provide TNT programming to Complainant is in violation of 47 C.F.R. § 1002(c)."[22]

10. *Exclusivity Issue.* The October 3, 1988 Scripps Howard/Turner contract gave Scripps Howard "[t]he exclusive license and right during the Term" to provide TNT in Glasgow,

> except that such licenses and rights shall not be exclusive with respect to any area where: (a) a third party was authorized by appropriate governmental authority to operate a cable system and was in fact operating that cable system as of March 9, 1988 . . . or (b) a third party system attained a mandatory cable franchise as of March 9, 1988 which provided that third party with an affirmative obligation to serve a specifically delineated geographical area. . . .[23]

11. The Scripps Howard/Turner contract is thus exclusive unless on the relevant date, March 9, 1988, some third party--Glasgow, for purposes of this *Memorandum Opinion and Order* --was either operating a cable system in Glasgow, Kentucky, or had by that date "attained a mandatory cable franchise . . . which provided [Glasgow] with an affirmative obligation" to so operate. In January 1988 the City of Glasgow, Kentucky ("City") granted Glasgow a franchise to install and operate a cable television system in Glasgow, Kentucky.[24]

12. There is no dispute that on March 9, 1988, Glasgow was not "in fact operating" a cable system. The Complaint acknowledges that "[t]he cable television system of Complainant began service, in June, 1989."[25] The Answer reiterates this admission.[26] The issue of whether TNT had provided exclusivity to Scripps Howard pursuant to the October 3, 1988 contract thus centers on whether, on March 9, 1988, Glasgow had "attained a mandatory cable franchise . . . which provided [it] with an affirmative obligation" to operate. Glasgow acknowledges that its franchise agreement "did not specifically impose such a mandatory obligation to build," arguing that "nonetheless same

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[12] Answer at 1-3.

[13] Complaint at 4; Exhibit 6 to the Complaint.

[14] Answer at 2-3.

[15] Exhibit 1 to the Declaration of Deborah Lalo submitted in support of Answer, at 12. The Lalo Declaration was submitted with four attached Exhibits. By letter of January 31, 1994, counsel for Turner submitted Exhibits 1, 2 and 3 to the Lalo Declaration separately from the Declaration itself and Exhibit 4, and requested confidentiality and the issuance of a protective order with respect to those three Exhibits. The request for confidential treatment is hereby granted, except that certain specific information from those Exhibits that is critical to the outcome of this dispute and to this *Memorandum Opinion and Order* will be incorporated, referenced or otherwise disclosed herein where necessary, but only to the extent necessary to support this *Memorandum Opinion and Order*. Turner's counsel was informed that public disclosure of such information would be necessary, and Turner has agreed that information related to the specific language used in the exclusivity provision in the Telescripps contract, the expiration date of the contract, and the fact that Georgia law governed the contract, could be disclosed.

[16] Answer at 3; Complaint at 4; Exhibit 7 to the Complaint.

[17] Exhibit 3 to Declaration of Deborah Lalo submitted in support of Answer, at 3; Answer at 5; Complaint at 5; Exhibit 7 to the Complaint.

[18] Exhibit 3 to the Declaration of Deborah Lalo submitted in support of Answer, at 7.

[19] Answer at 5.

[20] *See also* 47 C.F.R. § 76.1002(e)(2).

[21] *See also* 47 C.F.R. § 76.1002.

[22] Complaint at 5.

[23] Answer at 2.

[24] Complaint at 2; Exhibit 1 to the Complaint. The city ordinance, which constitutes the franchise agreement, is attached to this *Memorandum Opinion and Order* as Exhibit 1. Note specifically § 1, § 6 and § 9 of the agreement.

[25] Complaint at 2.

[26] Answer at 5.

was implicit in" the franchise agreement.[27] Turner responds that "the franchise agreement that Glasgow had in place . . . gave Glasgow the *authority* to build a cable system within a given period of time. Glasgow's franchise agreement, however, did not resemble the 'mandatory obligations to build a cable system' [that] the [Scripps Howard/Turner contract] contemplates . . .. which characteristically mandate building out all homes in certain clearly defined areas and impose severe financial sanctions if the operator fails to build or does a poor job of construction."[28]

13. In any event, after receiving a franchise from the City of Glasgow, Glasgow contacted TNT, seeking its programming. In May 1988 Glasgow received what it terms "a contract whereby it could acquire and distribute TNT," claiming it "was offered [this contract] by Defendant."[29] Turner responds that the document Glasgow received in May, 1988 was "a standard exclusive TNT Affiliate Agreement," which Turner says was made available for Glasgow to review to determine whether it could purchase TNT.[30] Turner explains that because it had "no specific knowledge of where cable operators were operating or whether one or more operators were serving cable in the same areas," its customary practice was to appraise operators seeking access to TNT of the standard contract terms governing distribution of TNT.[31] By allowing an operator to examine the exclusivity provision in the standard contract to determine whether such operator was eligible to receive TNT, Turner contends that it "specifically attempted to protect itself contractually against any unintentional conflicting grants of rights."[32] Turner explains that the slightly modified exclusivity provision in the Scripps Howard/Turner contract is merely an annotated version of its general "standard exclusive TNT Affiliate Agreement."[33]

14. The parties agree that Glasgow returned the "contract" or the "standard exclusive TNT Affiliate Agreement" to Turner in March 1989,[34] three months before Glasgow's system began service. Glasgow argues that it "formally tendered to Defendant the contract" and that

> [d]efendant declined to itself sign that contract. Complainant was subsequently advised by Defendant that its refusal to provide TNT service was based upon an allegedly exclusive agreement with Telescripps Cable Company, whereby TNT would not be made available to Complainant. Defendant contended that the franchise of Complainant did not impose a mandatory obligation to build and to have a cable distribution system in place as of March 9, 1988.[35]

Turner responds that it refused to execute the agreement because Telescripps/Scripps Howard was already a TNT affiliate, and that a subsequent grant to Glasgow of TNT carriage would have violated its existing grant of exclusive distribution to Scripps Howard.

15. To summarize thus far: the pleadings indicate that in May 1988, Glasgow received a form contract for distribution of TNT from Turner setting forth the relevant standard "exclusivity" provision. Glasgow believed that this constituted an "offer" from Turner; Turner contends that it had merely provided its standard form contract at Glasgow's request. Glasgow did not immediately respond. Scripps Howard, however, entered into a contract with Turner on October 3, 1988, which contained a slightly modified version of the exclusivity provision. In March 1989, the parties agree that Glasgow returned the Turner contract to Turner, which Glasgow considered to be an acceptance of the offer to purchase distribution rights for TNT from Turner. Turner refused to sign the agreement, however, responding that it had entered into an exclusive obligation to provide TNT to Scripps Howard on October 3, 1988.[36]

16. The parties agree that in March 1991, the City amended Glasgow's original January 1988 Franchise Agreement.[37] The amendment was effective "as of the effective date of the Franchise Ordinance, nunc pro tunc."[38] The amendment to the franchise agreement noted that the City "desires to clarify and ensure the obligation originally undertaken by [Glasgow] and required by [the franchise agreement] to timely complete the construction of said cable television system so as to enable it to provide cable television service to all areas of the City served by [Glasgow]," and further noted that Glasgow "agrees that the understanding and intent of the franchise [agreement] was that [Glasgow] would without delay commence construction of the cable television system and complete it within a reasonable period of time."[39] The amendment to the franchise agreement then added to § 6 of the franchise agreement the following requirement:

> [i]f [Glasgow] has not completed construction of its entire cable television system so that it is able to provide cable television service, upon request, to subscribers in all areas of the City served by [Glasgow] within three (3) years of the effective date of this [Amendment], [Glasgow] shall forfeit to the City $100 per day for each and every day that such construction is not completed.[40]

17. Glasgow argues the amendment to the franchise agreement was imposed by the City as a simple clarification that the original franchise agreement contained an

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[27] Complaint at 2.
[28] Answer at 5.
[29] Complaint at 2.
[30] Answer at 3.
[31] Answer at 3-4.
[32] *Id.*
[33] Answer at 3.
[34] Complaint at 2; Answer at 4.
[35] Complaint at 2.
[36] Complaint at 2; Answer at 4-5; Exhibit 4 to the Declaration of Deborah Lalo submitted in support of Answer.
[37] Complaint at 2-3; Answer at 5.
[38] The amendment is attached to this *Memorandum Opinion and Order* as Exhibit 2. It is also attached as Exhibit 2 to the Complaint. *See* amendment to the franchise agreement at SECTION 3; Complaint at 3; Answer at 5.
[39] Amendment to the Franchise Agreement at 1.
[40] Amendment to the Franchise Agreement at SECTION 1; Complaint at 2-3; Answer at 5.

implicit mandatory obligation to build.[41] Turner argues it was written in specific response to Turner's rejection of Glasgow's application for TNT carriage, designed to refute, retroactively, Turner's objections. In any event, Turner argues "the amendment did not change [Turner's] obligation to Scripps Howard for TNT exclusivity[.]"[42]

18. The parties agree that, with its amended franchise agreement in hand, Glasgow again sought to purchase TNT in April 1991. Reiterating its previous position, Turner again denied the application,[43] and Glasgow filed its complaint.

III. ANALYSIS

19. *Renewed or Extended Issue.* For Glasgow's complaint to have merit and for us to grant the relief sought, we must find that, under Georgia law, the August 27, 1990 amendment establishes a new contract separate and distinct from the January 3, 1988 contract, such that the effect of entering the 1990 contract was rescission of the 1988 contract. The law does not support such a determination.

20. General contract principles establish that in order for the August 1990 amendment to be considered a separate and distinct contract, rather than merely a renewal, extension or modification of the original January 1988 contract, the amendment must have substantially changed the rights and duties under the original contract. The surrender of rights under the original contract is the consideration for the mutual agreement of rescission. Complete rescission is necessary, for any change "which would discharge less than all the parties' remaining duties of performance is best treated as a modification."[44] Relevant case law states:

> To have the effect of complete rescission, the new contract must either explicitly rescind the earlier contract, or deal with the subject matter of the former contract so comprehensively as to be complete within itself . . ., or it must present such inconsistencies with the first contract that the two cannot . . . stand together.[45]

21. Thus, under general contract principals we believe that the August 1990 amendment must be viewed as a modification and extension; the changes it made to the original contract fall far short of those needed to qualify the amendment as a separate and distinct contract, amounting to rescission of the original contract. The changes affect only specific details of program provision, advertising requirements, and rates and fees and their structure.[46] But the amendment leaves the general purpose of the original contract in place, presents no material inconsistencies with the original contract, and cannot be viewed as complete within itself. Moreover, it expressly states that the original contract continues "in full force and effect."[47] Further, in Georgia "[t]he law is clear that rescission requires the mutual assent of the parties, expressly, impliedly or by conduct.[48] Nothing in the record suggests any party to the TNT, Inc./Scripps Howard contract ever intended to rescind the contract, or ever acted in such a way as to manifest such intent.

22. Therefore, we find that the law and the facts are clear: the August 1990 amendment merely extended the contract's term to October 31, 1994. The contract, dating from October 1988 and thus entered into prior to June 1, 1990, and extended before October 5, 1992, remains in force and, again assuming it is in fact exclusive, is "grandfathered" pursuant to § 628(h) of the *1992 Cable Act.*

23. *Exclusivity Issue.* While we believe that the question of whether the Turner/Scripps Howard contract actually confers exclusive distribution rights is difficult, we must nonetheless conclude that the contract is exclusive. It is clear Glasgow was not operating a cable system on March 9, 1988. Whether it had an affirmative obligation to do so because it had a mandatory franchise is a more complicated matter. The arguments of both parties on this point are reasoned and have merit. Under the circumstances, we find determinative the facts that: (1) neither the term "obligation" nor the term "mandatory" is found in any of the relevant sections of the original franchise agreement; (2) Glasgow admits that the original franchise agreement "did not specifically impose such a mandatory obligation to build";[49] and (3) the original franchise agreement contains no penalties for not building. Therefore, we cannot conclude that the original franchise agreement constituted a "mandatory cable franchise . . . which provided [Glasgow] with an affirmative obligation to serve" the City.[50] Accordingly, we find that the Turner/Scripps Howard contract does, in fact, provide Scripps Howard with exclusive distribution rights for TNT.

24. We emphasize, however, that when the current contract expires on October 31, 1994, the program access regulations require Turner to negotiate with Glasgow, offering distribution rights on non-discriminatory terms and conditions, or to petition the Commission for exclusivity in an attempt to establish that it is in the public interest for it to withhold TNT from Glasgow. Moreover, we note that

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[41] Complaint at 2-3.
[42] Answer at 5.
[43] Complaint at 3; Exhibit 3 to the Complaint; Answer at 5.
[44] E. Allan Farnsworth, *Contracts* § 4.24 n.18 (1982).
[45] *Silver Syndicate v. Sunshine Mining Co.*, 101 Idaho 226, 611 P.2d 1011 (1979). *See also Travelers Ins. Co. v. Workmen's Compensation Appeals Bd.*, 434 P.2d 992, 998 (1967), stating "[a]nh),alteration of details of the contract which leaves undisturbed its general purpose constitutes a modification rather than a rescission of the contract."
[46] Exhibits 1 and 3 to the Declaration of Deborah Lalo submitted in support of Answer.
[47] Exhibit 3 to the Declaration of Deborah Lalo submitted in support of Answer, at 7.
[48] *Cornell Industries, Inc. v. Colonial Bank*, 162 Ga. App. 822, 823, 293 S.E. 2d 370, 371 (1982) (oral agreement to negotiate a possible modification of original contract did not constitute a rescission or termination of that contract). *See also Owens v. Union City Chrysler-Plymouth, Inc.*, 210 Ga. App. 378, 436 S.E. 2d 94 (1993) (holding no rescission of contract; where contract contains a merger clause, party's announced purpose to rescind, to which his subsequent actions must then adhere, is necessary for rescission).
[49] Complaint at 2.
[50] Exhibit 1 to the Declaration of Deborah Lalo submitted in support of Answer, at 3.

§628 of the *1992 Cable Act* provides that a contract "renewed or extended after October 5, 1992, shall not be exempt" from the program access regulations.[51]

25. *Request For Attorney's Fees.* Turner has requested that it be awarded costs and attorney's fees. In the Commission's order implementing the program access requirements of § 628,[52] the Commission determined that, with respect to remedies for violations of the exclusivity prohibitions, the *1992 Cable Act* provides the Commission with the authority to order a programming vendor violating its rules to provide the subject programming to the complainant on non-discriminatory terms and conditions. In addition, the Commission may impose sanctions that are available under Title V of the Communications Act of 1934, *as amended*.[53] The Commission concluded, however, that the statute did *not* grant the Commission the authority to assess damages for violations of the program access provisions, because it contains no express provision for damages.[54]

26. Similarly, we note that the *1992 Cable Act* does not expressly grant the Commission the authority to assess damages, costs or attorney's fees for violations of the provision prohibiting the filing of frivolous complaints.[55] The United States Court of Appeals for the District of Columbia has determined that, absent an express grant of authority, the Commission does not have the authority under its general statutory authority contained in § 4(i) of the Communications Act of 1934, *as amended*, to award attorney's fees.[56] Therefore, we conclude that the Commission does not have authority under the *1992 Cable Act* to award costs and attorney's fees for violations of its rules prohibiting the filing of frivolous program access complaints.[57]

27. In any event, we do not find that the complaint filed by Glasgow is frivolous. Glasgow's complaint was not filed "without any effort to ascertain or review the underlying facts."[58] Further, the complaint is not based on "arguments that have been specifically rejected by the Commission in other proceedings," nor does it have "no plausible basis for relief."[59] The complaint raised legitimate questions as to whether the Turner/Scripps Howard contract was "grandfathered" under the statute. Thus, we cannot conclude that Glasgow's complaint is frivolous. Accordingly, Turner's request for costs and attorney's fees must be denied.

IV. ORDERING CLAUSE

28. Accordingly, IT IS ORDERED, that Glasgow's program access complaint IS DISMISSED. Such dismissal is WITHOUT PREJUDICE to Glasgow's ability to renew its complaint after October 31, 1994. Turner's request for costs and attorney's fees IS DENIED. This action is taken by the Chief, Cable Services Bureau, pursuant to authority delegated by § 0.321 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Acting Chief, Cable Services Bureau

[51] *See* 47 U.S.C. § 548(h)(2); *see also* 47 C.F.R. § 76.1002(e)(2).
[52] *See First Report and Order* in *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket 92-265, 8 FCC Rcd 3359 (1993) (*"First Report and Order"*).
[53] *See First Report and Order*, 8 FCC Rcd at 3392.
[54] *Id.* We note that the National Rural Telecommunications Cooperative has filed a petition for reconsideration of this determination in MM Docket 92-265.
[55] *See* 47 U.S.C. § 548(f)(3).
[56] *See Turner v. FCC*, 514 F. 2d 1354 (D.C. Cir. 1975).
[57] *See* 47 C.F.R. § 76.1003(q).
[58] *See First Report and Order, supra*, at 3427.
[59] *Id.*

EXHIBIT 1

ORDINANCE NUMBER 1754

ORDINANCE GRANTING COMMUNITY ANTENNA TELEVISION SERVICE FRANCHISE TO Electric Plant Board, City of Glasgow

WHEREAS, the City Council has previously by Municipal Order authorized the advertising of a franchise for the establishment of a community antenna television service system in the City of Glasgow, Kentucky, and

WHEREAS, such proposed award of franchise has been duly advertised as required by KRS Chapter 424, and

WHEREAS, bids were received for such franchise on January 25, 1988, and

WHEREAS, the Mayor and the Glasgow City Council have determined that the bid of Electric Plant Board, City of Glasgow represents the highest and best bid,

NOW THEREFORE, BE IT ORDAINED by the City Council of Glasgow, Kentucky, as follows:

SECTION 1.

The City of Glasgow (hereinafter "CITY") hereby grants to Electric Plant Board, City of Glasgow (hereinafter **"GRANTEE"**), its successors and assigns, the non-exclusive franchise and license, for a period of twenty (20) years from the effective date of this Ordinance, to install and operate a community antenna television system in City, to furnish and sell the service from such system to the inhabitants of the City, and to use and occupy the streets, alleys and other public places within

the City for the placement of the wires, cables, poles and other supporting structures necessary for such system.

SECTION 2.

So far as practical the Grantee shall use existing utility poles erected and maintained by the Grantee, and other utilities.

SECTION 3.

All streets and sidewalks disturbed or damaged in the construction or maintenance of said system shall be promptly repaired to the reasonable satisfaction of City, by and at the expense of Grantee.

SECTION 4.

All wires, cables, and other supporting structures necessary for the erection and operation of said system by the Grantee shall at all times comply with the minimum standards of all statutes, ordinances, laws, and regulations relating to same.

SECTION 5.

Grantee shall indemnify and save City harmless from any and all claims, actions and/or suits, including legal fees and other expenses relating thereto, arising out of the construction, maintenance, or operation of such system.

SECTION 6.

The right, privilege and authority granted herein shall be for a term of twenty (20) years from the effective date of this Ordinance, provided, however, that upon the failure of Grantee to commence operations in a substantial manner within one (1) year from the date of this Ordinance, City may terminate the authority herein granted upon the giving of thirty (30) days written notice to Grantee of its intention to terminate same.

SECTION 7.

In consideration of the rights, privileges and authority hereby granted and in compensation to the City for the use of its public places, Grantee agrees to pay to City a sum equal to three percent (3%) of its gross proceeds from the sale of entertainment services of the aforesaid system, such sums to be payable quarterly, on or before thirty (30) days after each calendar quarter.

SECTION 8.

All Ordinances and parts of Ordinances in conflict herewith are hereby amended accordingly.

SECTION 9.

All provisions of this Ordinance shall be binding upon the Grantee and all successors, lessees and assigns, and all the rights, authorities, powers, grants and privileges shall be held

to inure to the benefit of the Grantee, its successors, lessees and assigns.

SECTION 10.

The provisions of the Ordinance are hereby declared to be severable. If any of its sections, provisions, exceptions, sentences, clauses, phrases or parts be held unconstitutional or void, the remainder of this Ordinance shall continue in full force and effect, it being the intent now hereby declared that this Ordinance would have been adopted even if such unconstitutional or void matter had not been included herein.

SECTION 11.

This Ordinance shall take effect upon its passage and publication as required by law.

Charles B. Honeycutt

CHARLES B. HONEYCUTT, MAYOR
City of Glasgow, Kentucky

ATTEST:

Les Settle

LES SETTLE, CITY CLERK

First Reading: 1-25-88

Second Reading: 2-8-88

HJH:jmj
(ltrs/ordin.10)

EXHIBIT 2

ORDINANCE NUMBER 1899

AMENDMENT TO ORDINANCE GRANTING
COMMUNITY ANTENNA TELEVISION SERVICE FRANCHISE TO
ELECTRIC PLANT BOARD, CITY OF GLASGOW

WHEREAS, the City Council by Ordinance Number 1754 awarded a franchise to the Electric Plant Board, City of Glasgow, to construct and operate a cable television system within the City of Glasgow (hereafter "Franchise Ordinance");

WHEREAS, the City Council desires to clarify and ensure the obligation originally undertaken by the Electric Plant Board and required by such Ordinance to timely complete the construction of said cable television system so as to enable it to provide cable television service to all areas of the City served by the Electric Division of the Electric Plant Board; and

WHEREAS, the Electric Plant Board agrees that the understanding and intent of the Franchise Ordinance was that the Electric Plant Board would without delay commence construction of the cable television system and complete it within a reasonable period of time.

NOW, THEREFORE, BE IT ORDAINED by the City Council of Glasgow, Kentucky, as follows:

SECTION 1. Add the following language to Section 6 of the Franchise Ordinance:

"If Grantee has not completed construction of its entire cable television system so that it is able to provide cable television service, upon request, to subscribers in all areas of the City served by Grantee's electric service within three (3) years of the effective date of this Ordinance, the Electric Plant Board shall forfeit to the City $100 per day for each and every day that such construction is not completed".

SECTION 2. All other provisions of the Franchise Ordinance remain unchanged.

SECTION 3. This ordinance shall relate to and take effect as of the effective date of the Franchise Ordinance, nunc pro tunc.

Charles B. Honeycutt

CHARLES B. HONEYCUTT, MAYOR

City of Glasgow, Kentucky

ATTEST:

Les Settle

LES SETTLE, CITY CLERK

First Reading: 2-25-, 1991

Second Reading: 3-11-, 1991

ACCEPTANCE:

The Electric Plant Board, City of Glasgow hereby accepts the terms of this amendment to the Franchise Ordinance.

William J. [illegible] Date: 3/13, 1991

Its: SUPERINTENDENT

HJH:tb
(cty\EPB.ord)

I CERTIFY THAT THIS IS A COPY OF THE ORIGINAL ORDINANCE FROM THE CITY COUNCIL MEETING 3-11-91.

Les Settle

LES SETTLE, CITY CLERK

FCC 94-238

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
	)	
CRAIG O. MCCAW,	)	
	)	
Transferor,	)	
	)	
and	)	
	)	
AMERICAN TELEPHONE AND TELEGRAPH COMPANY,	)	File No. ENF-93-44
	)	
Transferee,	)	
	)	
For Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries	)	File No. 05288-CL-TC-1-93 et al.

MEMORANDUM OPINION AND ORDER

Adopted: September 19, 1994; Released: September 19, 1994

By the Commission: Commissioner Ness not participating.

TABLE OF CONTENTS

Paragraph

I. INTRODUCTION.....1

II. BACKGROUND

A. The Applicants.....2

B. The Applications.....4

C. Petitioners and Commenters.....5

D. Hart-Scott-Rodino Documents.....6

III. DISCUSSION

A. Section 310(d) of the Communications Act.....8

B. Competitive Impact.....9

1. Relevant Markets.....10

2. Interexchange Services in the United States.....21

Regional and National Cellular Services.....33

3. Local Cellular Services in MSAs and RSAs.....36

4. Manufacture of Cellular Network Equipment for Use in North America.....42

5. Pro-Competitive Effects of the Proposed Merger.....57

C. Proposed Conditions.....62

1. Equal Access.....63

2. Bundling and Packaging

a. Cellular and Interexchange Services.....71

b. Cellular Network Equipment & Cellular Services..79

3. Use of Information.....81

4. Billing and Collection Services.....84

5. Resale of Local Cellular Services.....87

6. Manufacturing Restrictions.....92

a. Nondiscrimination, Notice, and Reporting Requirements.....94

b. Proprietary Product Development.....101

c. Patent Licensing.....106

d. Disclosure of Proprietary Customer Information.....109

7. Affiliate Transactions/Structural Separation

a. Affiliate Transactions.....114

b. Separate Corporate Subsidiary.....117

8. Mobile Satellite Services.....126

D. Miscellaneous/Other Claims

1. Exemption from Cut-off Rules.....137

2. HCTC Agents.....138

3. Matters Involving LIN Broadcasting Corporation

a. Background.....141

b. Continuing Satellite Authorization.....142

c. Other Media Interests of AT&T Directors.....147

d. NABOB's Informal Objection.....149

4. The Ad Hoc IXCs.....152

E. Procedural Issues

1. Application for Review and Motion for Production of Documents.....155

2. AT&T's Motion to Disqualify or to Impose Sanctions.159

3. Bell Companies' Motion for Waiver of Protective Order.....165

4. Adequacy of the Record.....169

IV. CONCLUSION.....174

V. ORDERING CLAUSES.....175

VI. APPENDIX A

I. INTRODUCTION

1. We have before us applications filed by American Telephone and Telegraph Company ("AT&T") and Craig O. McCaw pursuant to Section 310(d) of the Communications Act.[1] Applicants seek our consent to transfer indirect control to AT&T of radio licenses and other authorizations held by McCaw Cellular Communications, Inc. subsidiaries and controlled partnerships ("McCaw") in connection with the proposed merger of AT&T and McCaw.[2] Under the terms of their merger agreement,[3] McCaw would merge with, and become, a wholly-owned subsidiary of AT&T.[4] The McCaw subsidiaries that are the FCC licensees would continue to exist as distinct corporate entities separate from the AT&T corporate entity. Applicants contend that "the proposed merger would help foster the continuing development of a competitive, innovative and high quality telecommunications marketplace without any adverse anticompetitive effects."[5] For the reasons discussed below, we conclude that transfer of the subject licenses and authorizations will serve the public interest, convenience, and necessity, and accordingly, we grant the applications. In so doing, however, we impose several conditions that we have determined to be necessary to guard against otherwise possible anticompetitive conduct.

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[1] 47 U.S.C. § 310(d). Under Section 310(d), before control over any radio construction permit, station license or any rights thereunder may be transferred, we must find that "the public interest, convenience, and necessity will be served thereby."

[2] Because AT&T and McCaw jointly filed their pleadings in this matter, unless otherwise noted, we summarize their arguments as by "AT&T and McCaw" or "the applicants." We refer to the entities that would result from the consummation of the proposed merger as "AT&T/McCaw."

[3] Agreement and Plan of Merger (copy attached to lead cellular application; see FCC Form 490, Exh. 3, Attachment 3-B).

[4] The transaction is to be accomplished by merging Ridge Merger Corporation ("Ridge"), a wholly-owned subsidiary of AT&T, with and into McCaw. Upon completion of the merger, Ridge will cease to exist as an independent entity and control of McCaw will transfer from Craig O. McCaw to AT&T. See FCC Form 490, Exhibit 3 at 2-3.

[5] Id. at 9.

II. BACKGROUND

A. The Applicants

2. AT&T is the largest provider of long distance telephone service in the United States. While its share of total toll service revenues has been declining over the past decade (from about 90% of the revenues received by all long distance carriers in 1984 to about 60% at the end of 1993), AT&T remains the dominant long distance or interexchange carrier ("IXC"). AT&T's share of the market for interstate switched minutes has declined from about 80% in late 1984 to 61% in the first quarter of this year.[6] In terms of total presubscribed telephone lines, AT&T enjoys a 71.2% share.[7] In addition, AT&T is one of the largest manufacturers of wireless network equipment in the U.S. and a prominent manufacturer and supplier of cellular and other telecommunications network equipment and computer products and software.

3. McCaw is the leading operator of conventional local and regional cellular services in the United States and resells AT&T long distance services to its cellular customers. McCaw is a cellular licensee in nearly 30% of the top 200 Metropolitan Statistical Areas ("MSAs") in the nation. In terms of the population in the MSAs in which McCaw is a cellular licensee ("pops"), it had 75.9 million pops at the end of 1993, the largest

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[6] Long Distance Market Shares, First Quarter, 1994, Industry Analysis Division, Common Carrier Bureau, FCC (July 1994); see also Statistics of Communications Common Carriers, Industry Analysis Division, Common Carrier Bureau, FCC, at 7 (1992/1993 ed.). Revenues reported for long distance service include intrastate toll revenues as well as interstate and international toll revenues. AT&T had pending before the Commission a petition requesting its reclassification to nondominant status. Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, Motion for Reclassification by AT&T (filed Sept. 22, 1993); See Public Notice, 8 FCC Rcd 7581 (1993).

[7] Long Distance Market Shares, supra, at Table 4. Precise calculations of market share vary depending on the time period used, and whether measured by customers, minutes of usage, or revenues. For purposes of analyzing this proposed merger, we consider interstate or interexchange communications to include the provision of international service. It does not appear that any of our findings or conclusions would be materially different if we considered international communications as a separate market for analytical purposes, and no party has raised any dispute concernin international communications.

number among all cellular licensees.[8] In addition to its substantial cellular operations, McCaw owns 52% of LIN Broadcasting ("LIN"), 32% of American Mobile Satellite Corporation ("AMSC") and 51% of Claircom Communications (a joint venture with Hughes Network Systems).

B. The Applications

4. McCaw holds more than 400 radio authorizations for which it and AT&T have filed applications seeking our consent to transfer control over them to AT&T.[9] Pursuant to these authorizations, McCaw owns, operates and controls various cellular radio telephone systems, paging systems,[10] common carrier point-to-point microwave systems, air-to-ground systems, marine maritime systems, private radio systems, and television broadcast stations.

C. Petitioners and Commenters

5. Petitions to impose conditions on the grant of the applications were timely filed by the Bell Atlantic Companies ("Bell Atlantic") and jointly by NYNEX Corporation ("NYNEX") and Pacific Telephone ("PacTel"). In addition, separate petitions to impose conditions, or alternatively to deny all the subject applications, were timely filed jointly by BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Enterprises, Inc ("BellSouth") and by Southwestern Bell Corporation ("SW Bell"). Separate petitions to deny, directed against grant of all the applications, were timely filed by the National Cellular Resellers Association ("NCRA") and the Ad Hoc IXCs. A petition directed against grant of only one application (to transfer cellular

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[8] Statistics for populations served by cellular carriers (a common measure of the value of cellular firms) show that, on an aggregate basis, McCaw is the nation's largest provider of cellular services. The nation's next largest cellular carriers in terms of pops were GTE Corporation with 55.5 million, AirTouch with 42.5 million, BellSouth with 38.4 million, Southwestern Bell with 35.7 million, and Bell Atlantic with 35.2 million. Telephone and Data Systems, Inc., Gabelli & Company, Inc., at 3 (May 17, 1994).

[9] See Public Notice, 8 FCC Rcd 7110 (1993). AT&T and McCaw also have filed an application, pursuant to Section 214(a) of the Act, to transfer control of Continental Intercell, Inc., a McCaw subsidiary, and holder of an authorization for resale of international services.

[10] McCaw is the fifth largest provider of paging service in the United States with over 500,000 subscribers throughout the country. AT&T and McCaw Opposition, Affidavit of James I Barksdale at ¶ 11.

licenses held by the Houston Cellular Telephone Company ("HCTC")) also was timely filed by Cellular Marketing, Inc., Lawrence Communications Company, Car Telephones, Inc. and Key Cellular, Inc. (collectively the "HCTC Agents").[11] Also, pursuant to our September 15, 1993 Public Notice,[12] comments were timely filed by Allnet Communications Services, Inc. ("Allnet"), Ameritech, People of the State of California and the Public Utilities Commission of the State of California ("California PUC"), Comsat Mobile Communications ("Comsat"), MCI Telecommunications Corporation ("MCI"), and Kenneth Robinson.[13]

D. Hart-Scott-Rodino Documents

6. Following the close of the pleading cycle established by the Public Notice in this matter[14], the Common Carrier Bureau ("Bureau") requested AT&T and McCaw to make available for inspection by Bureau staff information and documents that AT&T and McCaw had filed with the Department of Justice ("the DOJ") and the Federal Trade Commission ("the FTC") pursuant to the pre-merger review process under the Hart-Scott-Rodino amendment to the Clayton Act ("HSR").[15] Through a series of rulings issued by the Bureau's Enforcement Division, approximately 44 boxes of HSR materials were made available by the applicants for examination by Commission staff. Counsel for the parties were permitted to examine these documents after executing confidentiality agreements.[16] Some of these rulings are the subject of a pending motion filed by several Bell Operating Companies ("BOCs") and an

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[11] The HCTC Agents seek to postpone final action on one application until a decision on their pending formal complaint, Cellular Marketing, Inc. v. Houston Cellular Telephone Company, File No. E-89-273.

[12] See n. 9, supra.

[13] See Appendix A for a list of others filing pleadings in this matter. The record herein is voluminous and includes more than ten factual affidavits by business executives and 18 opinion testimonies by economic theorists and other experts.

[14] See n. 9, supra.

[15] Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. § 18 (1994 Supp.). The HSR pre-merger review process provides an opportunity for the DOJ or the FTC to seek a court order to block a proposed combination that would be anticompetitive and violate federal antitrust laws.

[16] See n. 354, infra.

application for review filed by BellSouth.[17] Following their examinations of the HSR materials, the parties were permitted to supplement their initial filings by June 20, 1994. Bell Atlantic, NYNEX, PacTel, and SW Bell jointly filed supplemental comments; BellSouth and the Ad Hoc IXCs filed separate supplements.[18] AT&T and McCaw filed responsive comments on July 1, 1994.[19] Copies of HSR documents attached to the parties' pleadings were filed under seal and are part of the extensive record of this proceeding.

7. As noted above, the DOJ has conducted a review of the proposed merger between AT&T and McCaw under the HSR.[20] On July 15, 1994, the DOJ, AT&T, and McCaw entered into a proposed consent decree that, if approved by the United States District Court for the District of Columbia, permits AT&T and McCaw to merge subject to a number of conditions. Before the District Court can render its decision, the proposed consent decree is subject to a period of public comment which has not yet expired. In the proposed consent decree, the DOJ seeks to impose a number of conditions which vary somewhat with those set forth in this Order. These varying conditions arise from different statutory review responsibilities. Our jurisdiction under the Communications Act gives us much more flexibility and more precise enforcement tools that the typical court has, or than we have under the Clayton Act.[21] We will have the opportunity to monitor the post-merger conduct of AT&T/McCaw and to adopt additional measures should they prove necessary. Also, our complaint processes are available to those who believe that AT&T/McCaw has violated the conditions set forth in this Order or any applicable provision of the Communications Act. In sum, our review under the public interest standard of the Communications Act has satisfied all of our concerns about the proposed merger, and our regulatory remedies under the Communications Act suffice to effect all the pro-competitive changes we wish to impose.

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[17] The pending motion and application for review are discussed in ¶¶ 155-168.

[18] Also on June 20, 1994, the State of California (California) filed comments advising that the California PUC had approved transactions relating to the proposed merger and attaching an opinion prepared by the California Attorney General regarding the competitive effects within particular product and geographic markets. The California PUC had requested that opinion as part of its record in contested proceedings before that agency.

[19] AT&T and McCaw attached a copy of the decision by the California PUC to their responsive comments as Appendix C.

[20] See ¶ 6 and n. 15, supra.

[21] See, e.g., 47 U.S.C. §§ 201-05, 207-09, 211, 213-15, 218-20, 312, 503.

III. DISCUSSION

A. Section 310(d) of the Communications Act

8. Section 310(d) of the Act requires that we find that the public interest, convenience and necessity will be served by the transfer of control of a company holding radio licenses.[22] Subsumed within this requirement is that we review the citizenship, character, financial, technical and other qualifications of the transferee applicant.[23] In this case, it appears that AT&T, a long-term Commission licensee and communications carrier, satisfies the threshold qualifications. No contention has been made that AT&T lacks the financial wherewithal or technical expertise to provide service consistent with the public convenience and necessity.

B. Competitive Impact

9. Our examination of a transfer of control under the public interest standard of Section 310(d) of the Act includes consideration of the effect of the transfer on competition. In addition, Sections 7 and 11 of the Clayton Act empower this Commission to disapprove anticompetitive acquisitions of "common carriers engaged in wire or radio communications or radio transmissions of energy."[24] The courts have construed these statutory authorizations to mean that the Commission has discharged its antitrust responsibilities "when the Commission seriously considers the antitrust consequences of a proposal and weighs those consequences with other public interest factors."[25]

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[22] See n. 1, supra.

[23] See, e.g., American Tel. & Tel. Co., Acquisition of ITT Communications Services, Inc., 2 FCC Rcd 3948, 3949 (Com. Car. Bur. 1987).

[24] Both AT&T and McCaw are common carriers. Section 7 of the Clayton Act, 15 U.S.C. § 18, proscribes the acquisition of the stock or assets of a company by another company "where in any line of commerce in any section of the country" the effect of such acquisition may be "substantially to lessen competition, or to tend to create a monopoly." Section 11 of the Clayton Act, quoted in the text above, is at 15 U.S.C. § 21(a).

[25] United States v. FCC, 652 F.2d 72, 88 (D.C. Cir. 1980)(en banc); OTI Corp., 6 FCC Rcd 1611, 1612 (1991). We have discretion whether to enforce Section 7 of the Clayton Act, United States v. FCC, 652 F. 2d at 83. For the reasons set forth above, we exercise our discretion not to invoke our Clayton Act jurisdiction in this proceeding. See ¶ 7, supra.

1. Relevant Markets

10. We are guided by the applicable judicial precedents, which begin with an antitrust analysis of the relevant markets or submarkets in which competition may be threatened.[26] The relevant "product market" is the "line of commerce" within which there is interchangeability of use between a service or product and a reasonable substitute for it, given consideration of price, use, and quality.[27] The relevant "geographic market" is the area in which buyers can practically turn for alternative sources of supply, or in which there are sellers who act to restrain the prices charged to those buyers.[28]

11. As the following discussion explains, we find three product and geographic markets for our competitive analysis of this proposed merger. They are: interexchange services in the United States; local cellular service in each Metropolitan Statistical Area ("MSA") or Rural Statistical Area ("RSA") in which McCaw offers such service; and the manufacture of cellular network equipment for use in North America.

Interexchange Services in the United States

12. The first market we find is all interexchange services in the United States. SW Bell argues for a narrower market consisting of cellular-originated interexchange calls in

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[26] United States v. Continental Can Co., 378 U.S. 441 (1964); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957); Standard Oil Co. v. United States, 337 U.S. 293, 299-300 n. 5 (1949); General Electric Co., 4 FCC Rcd 8207, 8208 (1989).

[27] Brown Shoe Co. v. United States, 370 U.S. 294, 324-25 (1962); United States v. FCC, 652 F.2d 72, 97 (D.C. Cir. 1980); General Electric Co., 4 FCC Rcd 8207, 8208-09 (1989). We also take guidance from the most recent Department of Justice - Federal Trade Commission Horizontal Merger Guidelines. 4 Trade Reg. Rep. (CCH) ¶ 13,104 at 20,571 (1992) ("Guidelines"). Under the Guidelines, "[a] market is defined as a product or group of products and a geographic area in which it is produced or sold such that a profit-maximizing firm, not subject to price regulation, that was the only present or future producer or seller of those products in that area likely would impose at least a 'small but significant and non-transitory' increase in price, assuming the terms of sale of all other products are held constant."

[28] United States v. Philadelphia National Bank, 374 U.S. 321, 359 (1963); Common Carrier Services, 95 F.C.C. 2d 554, 573 (1983), rev'd on other grounds, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992).

each cellular market in which McCaw competes with a non-BOC cellular carrier that offers bundled cellular and interexchange services.[29] On the other hand, AT&T and McCaw maintain that a "wireless long-distance submarket," as described by SW Bell's affiants, does not exist. AT&T and McCaw state that only 3-5% of cellular calls are interexchange calls, and that interexchange services costs are an "equally minute percentage" of the costs that cellular carriers and customers incur in providing or using cellular service.[30] Instead, AT&T and McCaw argue that the relevant market is all interexchange calls, nationwide.[31]

13. The parties' submissions on this issue and the evidence they have submitted are not decisive. The DOJ, which is not a party to this proceeding, found "[t]he provision of interexchange services to cellular subscribers" to be a relevant product market"; that "[c]ustomers use cellular phones to meet their needs away from landline telephones; that access to interexchange service over landline telephones is inconsistent with the needs motivating cellular phone usage and thus is not a substitute."[32] On the other hand, the California PUC, which is a party to this proceeding, approved the merger relying in substantial part on the opinion of its Attorney General, which it supplied for our record. The California Attorney General took cognizance of evidence in our record and of the BOC contention that a relevant product market is the wholesale provision of interexchange cellular originated telephone calls. He concluded, however, as did the California PUC, that the relevant long-distance product market was interexchange services. The Attorney General reasoned that, because wholesale interexchange services purchased

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[29] Salop and Fisher would include cellular-originated interexchange calls that are handled by resellers. SW Bell Petition, Affidavit of Professors Salop & Fisher at 6, 24. According to BellSouth, in some major cellular systems of one BOC, interLATA calls account for between three and four percent of total cellular usage. BellSouth Petition, Affidavit of Richard P. Rozek at 17.

[30] AT&T and McCaw Opposition at 44.

[31] Id. at 50.

[32] On July 15, 1994, the DOJ filed a complaint in U.S. District Court for the District of Columbia, alleging that the proposed merger would violate Section 7 of the Clayton Act. United States v. AT&T, No. 94-01555 (HHG) (D.D.C., filed July 15, 1994). The words quoted in the text above are from paragraph 25 of the Complaint therein. On the same day, the DOJ, AT&T and McCaw filed a Stipulation and proposed Final Judgment settling the DOJ's litigation ("Stipulation"). The proposed final judgment is now being considered by the District Court.

by cellular carriers are essentially identical to the services purchased by other large volume customers, and because there is an active resale market for interexchange services, arbitrage activities would defeat any attempt by AT&T/McCaw to raise cellular interexchange rates above existing levels.[33]

14. From a technical perspective, there is no significant difference between the interexchange facilities made available to a customer making an interexchange call from a "wireline" telephone and the facilities made available to a customer making an interexchange call from a cellular phone. Cellular carriers buy virtually the same interexchange service packages from AT&T and other IXCs as do other large-volume users of interexchange services.[34] Also, prior Commission decisions have viewed interexchange services to comprise one market.[35] Finally, there is anecdotal evidence that there appears to be some substitution occurring between interexchange calls from cellular units and some kinds of interexchange calls from "wireline" telephones (operated-assisted and credit card calls).[36]

15. As some petitioners urge, we could view the relevant long distance market as the provision of interexchange services to cellular subscribers and therefore view the proposed merger as combining the two largest carriers in such market, as the DOJ did in its Clayton Act complaint. We note that the DOJ has agreed to withdraw its suit to enjoin the proposed merger if the court agrees to impose certain conditions to which the parties have stipulated

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[33] Opinion of California Attorney General at 13.

[34] AT&T and McCaw Opposition, Affidavit of Willig and Bernheim at 5, 17-18.

[35] Common Carrier Services, 95 FCC 2d 554, 562-63 (1983), rev'd on other grounds sub nom., AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992). Although we now regulate business and residential interexchange services differently, we have not had cause to consider the existence of economically cognizable markets or submarkets for interexchange services. See generally Competition in the Interexchange Marketplace, 6 FCC Rcd 5880 (1991). SW Bell concedes this fact. SW Bell Reply at 45.

[36] See, e.g., Bell Atlantic Comments at 8 (filed June 20, 1994); AT&T and McCaw Reply at 39, n. 85 (filed July 1, 1994). It is unclear what inferences can validly be drawn from this evidence. It could be said to show a significant number of customers to whom both cellular and "wireline" interexchange services appeal, and thus to support an "all interexchange" market. Or, it could show a shift of customers from wireline to cellular interexchange calling and thus to support the existence of a growing "cellular only" interexchange market.

in their proposed Final Judgment in settlement of the DOJ's civil antitrust suit. Similarly, even if we were to view interexchange services to cellular subscribers as a relevant market or submarket, we would approve the proposed merger with the same conditions we impose below.

Local Cellular Service in MSAs and RSAs

16. The second market we find is local cellular service in each MSA or RSA where McCaw provides it. BellSouth seemingly disagrees with this local focus, contending that McCaw "towers over its rivals" in providing cellular service with its ability to reach 60.4 million net potential subscribers in the United States.[37] AT&T and McCaw dispute BellSouth's claim that McCaw is a "towering" presence in the wireless market by pointing out that McCaw is the largest cellular carrier by relatively small margins over GTE/Contel and BellSouth.[38] More importantly, AT&T and McCaw argue, wireless carriers compete locally, not nationally.

17. For purposes of the proposed merger, we conclude that the relevant product and geographic market for cellular service is the provision of cellular radio service in each MSA or RSA in which McCaw offers such service. MSAs and RSAs are the basic territorial units by which we have licensed cellular carriers. They are also the areas within whose limits cellular carriers create their coverage areas, except in a number of instances where multi-city or regional coverage areas are stitched together or offered to customers as an option. The concern of several of the parties about regional and national cellular coverage areas on the provision of cellular radio service is addressed below in our discussion of interexchange services.[39]

Manufacture of Cellular Network Equipment for Use in North America

18. The third relevant market we find is the manufacture of cellular network equipment for use in North America. BellSouth

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[37] BellSouth Petition at 25.

[38] AT&T and McCaw Opposition at 27.

[39] See ¶¶ 21-35, infra. We have chosen to use the local exchange commercial mobile radio service market that exists currently. It is noteworthy that this current focus is on a more concentrated marketplace than we examined in the CMRS rulemaking proceeding, Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, FCC No. 94-145, 9 FCC Rcd ___, 59 Fed. Reg. 35,664 (July 13, 1994) (CMRS Notice), so that we are in no sense ignoring any antitrust dangers that might be present in the larger market.

and SW Bell contend that the product market to be examined is the manufacture and sale of cellular network equipment nationwide.[40] AT&T and McCaw agree with this description of the product market but argue that its geographical scope should be considered an international one. They note that cellular networks are manufactured and purchased worldwide, and that several manufacturers who now sell only outside the United States could, with modest effort, enter and sell in the U.S. market.[41]

19. The "manufacture and sale" of cellular network equipment continues well beyond a manufacturer's "initial sale" of cellular network equipment to a cellular carrier. After that, there is still significant commerce in maintenance and repair, as well as the purchase of additional radio towers, software upgrades, and related equipment. Much of this activity involving domestic cellular carriers occurs in the United States, and, as a consequence, many of the foreign-based equipment manufacturers or their agents, have a presence in this country. Cellular equipment manufactured for sale in the United States is based on a different standard than equipment manufactured for use in Europe.[42] Therefore, we find that, for the purpose of analyzing this merger, the relevant market is the manufacture of cellular network equipment for use in North America, and the maintenance and repair of such networks.

Summary of Competitive Analysis

20. We now address the competitive impact of the proposed merger in each of the markets we have identified. In each market we must examine, the issue is whether the proposed merger will violate antitrust policies. In the case of a proposed merger, we are particularly mindful of Section 7 of the Clayton Act, which generally proscribes mergers "where in any line of commerce in any section of the country" the effect of the merger may be "substantially to lessen competition, or to tend to create a monopoly."[43] We also take care to examine the proposed merger for equally serious but less broad-sweeping violations of antitrust principles, such as theft of confidential information, tie-in sales, unjustified price discrimination, and other abuses of market

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[40] Cellular networks consist generally of a central switch or switches, radio transmitters contained in "cell sites", and computer software. See, e.g., Ameritech Comments at 10. The term "cellular network equipment" excludes cellular telephones or customer-provided terminal equipment ("CPE").

[41] AT&T and McCaw Opposition at 91 & n. 172.

[42] Id., Sullivan Affidavit at 6-7.

[43] 15 U.S.C. § 18.

power.[44] The principal way in which the commenters allege that the proposed merger will violate antitrust principles is by abuses which, it is said, will flow from the combination of McCaw's "bottleneck" cellular exchange and AT&T's power in other markets. In general, after careful consideration of the voluminous antitrust arguments made by all parties, we conclude that the competitive component of our statutory public interest standard will be satisfied by the imposition of two major conditions on our approval of the proposed merger: (1) that AT&T shall not discriminate in favor of McCaw and against its other customers for cellular network equipment under existing contracts; and (2) that AT&T and McCaw shall each take appropriate steps to prevent third parties' proprietary data from falling into the other's hands. These and other conditions are discussed in the following paragraphs.

2. Interexchange Services in the United States

Comments and Other Filings

21. Bell Atlantic, SW Bell, and BellSouth argue that the long distance market is a "stable oligopoly" with AT&T as the dominant firm.[45] BellSouth contends that, as the dominant IXC, AT&T has shown its ability to set a price umbrella for its IXC competitors.[46] Citing a recent FCC staff report entitled "Long Distance Market Shares," SW Bell maintains that AT&T's share of the 1992 long-distance market was about 60% of toll revenues.[47] SW Bell further maintains that AT&T's share of the market for presubscribed

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[44] "Market power is the power to force a purchaser to do something that he would not do in a competitive market.... It has be defined as the ability of a single seller to raise price and restrict output." Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. ___, 112 S. Ct. 2072, 2080-81 (1992) (quotation marks and citations omitted); see also Guidelines at ¶ 20,570-71.

[45] SW Bell Petition at 24, 32; Bell Atlantic Petition at 2; BellSouth Petition at 32-33. SW Bell's affiants, Salop and Fisher, also present arguments that a relevant market is cellular-originated long-distance calls, including those "carried" by resellers. SW Bell Petition, Affidavit of Salop and Fisher at 6.

[46] BellSouth Petition at 24.

[47] SW Bell Petition at 16; See also BellSouth Petition at 24. According to BellSouth, AT&T has had a 74.2% increase in the quantity of traffic it carries since 1984. BellSouth Petition at 23.

services approaches 80% overall, and is higher in each of the wireless markets operated by SW Bell.[48]

22. SW Bell argues that the AT&T/McCaw combination would result in a horizontal merger between two long-distance competitors.[49] SW Bell maintains that McCaw has leased or deployed interexchange facilities of its own within the areas it serves, and plans to join these areas, primarily through microwave links and long-distance links through subsidiaries.[50] SW Bell argues that even in its role as a reseller of interexchange services, McCaw should be considered an IXC just as facilities-based carriers are, even though it does not provide all the functions of a facilities-based carrier.[51]

23. SW Bell and BellSouth argue that one danger of the proposed merger is that AT&T/McCaw will be able to establish a nationwide end-to-end network by using McCaw's switches as an alternative to LEC facilities.[52] BellSouth contends that AT&T/McCaw would have the ability to shift interexchange traffic from the access charge system and avoid paying access charges at both ends of an interexchange call.[53] SW Bell asserts that even today long-

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[48] SW Bell Petition at 16. In addition, SW Bell maintains that a recent study filed with the DOJ by the BOCs shows that 70% of cellular providers who identified their IXC use AT&T. According to SW Bell, the BOCs' study also shows that among the non-wireline cellular carriers who identified an IXC, 88% used AT&T. Id. at 20; accord Bell Atlantic Reply at 2 (AT&T carries about 80% of the long-distance traffic from Bell Atlantic's cellular systems).

[49] SW Bell Petition at 20-21.

[50] Id. at 24-27. With regard to subsidiaries, SW Bell states that "McCaw controls LIN; LIN in turn owns the largest share (32 percent) of AMSC. AMSC holds the sole U.S. license to operate mobile satellite voice services via geostationary satellites." Id. at 27. SW Bell further states that AMSC will provide two-way switched voice and data service throughout North America. SW Bell contends that AMSC will compete directly with AT&T, which is one of the four dominant domestic satellite operators. Thus, SW Bell further contends, by acquiring McCaw, AT&T is entering into a joint venture with a leading satellite service competitor. Id. at 27-29. See ¶¶ 126-131, infra.

[51] Id. at 30-32.

[52] Id. at 24; BellSouth Petition at 29-30.

[53] BellSouth Petition at 29-30. BellSouth argues that through avoiding access charges, AT&T/McCaw would save "billions of dollars annually" that would "come out of the pockets of local

distance calls are often completed end-to-end on McCaw's own facilities, with the total charge to the customer frequently less than if the calls were carried on one of the landline IXCs.[54] BellSouth adds that AT&T/McCaw could use fixed cellular units and other wireless local loop technologies for local transport to reach non-cellular subscribers directly.[55] Finally, all of the BOCs claim that AT&T's continued "lock" on McCaw's interexchange traffic will be especially unfair in light of their obligation under the Modification of Final Judgment ("MFJ") to provide "equal access" to IXCs, the prohibition on the BOCs' providing inter-LATA service (and serving large coverage areas) without special court permission, and their inability to "bundle" exchange and interexchange services.[56]

24. SW Bell also expresses concern that AT&T/McCaw will likely seek to bundle and sell local and long-distance wireless services as a single service. SW Bell states that, because of FCC regulations and MFJ restrictions,[57] BOC wireless customers must obtain their long-distance service separately, at retail rates higher than AT&T's marginal costs. SW Bell maintains that AT&T/McCaw will be able to raise charges for wireless long-distance calls far above cost, or reduce its prices to cost and devastate

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exchange ratepayers." Id. at 32.

[54] SW Bell Petition at 24.

[55] BellSouth Petition at 29-30. BellSouth maintains that McCaw already has a prototype of this arrangement in place in Florida, called the "City of Florida," where its cellular switches are linked together. According to BellSouth, subscribers are able to receive calls throughout McCaw's network at a flat-rate airtime charge, with interexchange calls billed at less than an IXC's retail rates. Id. at 30-31.

SW Bell claims that, before it began merger discussions with AT&T, McCaw's goal was to build a wireless network to serve the entire country. SW Bell Petition at 21-23; see also Ameritech Reply at 2-3.

[56] See, e.g., Ameritech Comments at 14, 16; Bell Atlantic Petition at 9-12; BellSouth Petition at 2-5, 23-40 passim; BellSouth Reply at 6-28; NYNEX and Pactel Petition at 6-7; SW Bell Petition at 36-38, 47-64, 70-73; Ad Hoc IXCs Petition at 21.

[57] See United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1993), modified, 714 F. Supp. 1 (D.D.C. 1988), aff'd in part and rev'd on other grounds, 900 F. 2d 283 (D.C. Cir. 1990).

its competitors, or it could do a combination of both.[58] In addition, SW Bell contends AT&T/McCaw will be in a position to provide interexchange services to McCaw at AT&T's own low marginal cost. According to SW Bell, this practice will make it difficult to enter the wireless market without being vertically integrated with a long-distance carrier.[59]

Opposition to Filings

25. AT&T and McCaw dispute each of the claims made by the BOCs regarding the impact of the proposed merger. The applicants contend that the claims of a horizontal merger are unfounded because AT&T and McCaw participate in separate and distinct markets (interexchange and cellular, respectively) that connect to "different sides" of the BOCs' local exchange monopolies.[60] They maintain that because they propose to integrate vertically and do not generally compete horizontally in providing interstate interexchange services to any customers, the merger will not reduce competition.[61] In addition, they state that while McCaw owns limited interexchange facilities and resells long-distance service to its customers, these account for less than 0.1% of national interexchange revenues.[62] Therefore, AT&T and McCaw contend, the merger will not impede competition in either national

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[58] SW Bell Petition at 48-50. SW Bell also argues that, AT&T/McCaw will take advantage of the FCC's cellular resale policies and immediately establish a national presence that will give it enormous leverage in competing for national accounts. Id. at 55. Because the MFJ requires BOC cellular affiliates to offer customers equal access to interexchange services, SW Bell may resell cellular service only in markets where an affiliate of another BOC (which must also offer equal access) is one of the cellular providers. Id. at 58. SW Bell further argues that because 21 of the top 100 cellular markets have no BOC competitor, and therefore no cellular system currently required to offer equal access, BOC cellular providers will be unable to resell in one-fifth of the top markets. Id. at 59; see also NYNEX and PacTel Reply at 5-7.

[59] SW Bell Petition at 37. SW Bell argues that this point is underscored by both Sprint's merger with Centel and MCI's plan to form a new wireless consortium. Id.

[60] AT&T and McCaw Opposition at 37-38.

[61] Id. at 49-50, 52-53.

[62] Id.

interexchange services or in the various local cellular service markets that McCaw serves.[63]

26. AT&T and McCaw next contend that there is no support for the BOCs' claim that the proposed merger will allow McCaw to provide long-distance service obtained from AT&T at rates lower than prevailing market prices that would have been charged in absence of a merger. They state that, in any event, they will subject all transactions between them to the Commission's Joint Cost and Affiliate Transaction Rules for as long as these rules are applicable to AT&T.[64]

27. AT&T and McCaw assert that AT&T would not be able to effect even a small price increase in the long distance services it provides to other wireless carriers, because these carriers would migrate to services used by other heavy users of interexchange services of AT&T.[65] AT&T and McCaw note that wireless carriers buy the same dedicated or switched services that corporate customers buy for internal use.[66] They also argue that they could not raise prices for particular cellular customers without also raising prices for other cellular customers to whom such a price rise would not be tolerable.[67] AT&T and McCaw state that AT&T cannot and will not charge cellular customers more for basic interexchange service than landline customers.[68]

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[63] Id. at 44. AT&T and McCaw argue that the long distance market is competitive, and that both the actual prices callers are paying for long distance services and the IXCs' average revenue per minute have been dropping steadily. Id. at 46-48 (citing Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5892 (1991)).

[64] AT&T and McCaw Opposition at 63.

[65] Id. at 51.

[66] Id.

[67] Id. at 65. AT&T and McCaw state that discriminating in favor of or against certain groups, without an appropriate cost showing, would violate Section 202(a) of the Act, which prohibits "unjust or unreasonable discrimination" in the provisions of "like" services. Id. at 66. They add that accepted antitrust doctrines recognize that the mere possibility of such irrational conduct is insufficient reason to stop a vertical merger. Id. at 64-65.

[68] Id. AT&T and McCaw argue that while a high level of fraud on cellular systems could add to the cost of providing interexchange service to cellular customers, this increase is offset by the savings achieved through cellular systems using Type 2 interconnection (where a cellular carrier can perform its own

28. With regard to the BOCs' equal access concerns, AT&T and McCaw state that they have committed to Congress that, if the merger is approved, McCaw will establish local calling areas comparable to the BOCs' local access and transport areas ("LATAs") authorized by the MFJ, and that each McCaw customer will have the ability to obtain local and interexchange services separately, and to use whichever IXC the customer chooses.[69] They maintain that because McCaw's customers are currently "locked-in" to one IXC, the proposed merger will provide additional competitive opportunities through AT&T and McCaw's equal access commitment.

29. The applicants deny claims that the proposed merger would enable them to offer "substitutes" for ordinary exchange services, avoid access charges, and harm universal service. They argue that cellular services complement local telephone service by allowing mobile customers to access the local exchange without being physically connected to a telephone line.[70] They add that the BOCs, the FCC, and the courts all agree that cellular services are not, and will not become in the foreseeable future, a cost-effective alternative to the local exchange.[71] AT&T and McCaw state that 99% of cellular calls are to landline phones and require interconnections to local telephone networks.[72]

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switching and direct calls to its customers). Therefore, according to AT&T and McCaw, AT&T/McCaw would avoid the carrier common-line element of access charges that landline customers must pay. Id.

[69] Id. at 43, 54-55. AT&T and McCaw state that many technical and other questions about AT&T's planning for equal access remain to be resolved. In addition, they state that they will await the Commission's adoption of specific requirements for equal access before addressing the "ancillary features" of equal access systems. Id. at 55.

[70] Id. at 119, 121. AT&T and McCaw concede that in some limited geographic or usage areas, cellular services would be able to compete with or displace some landline usage. They argue, however, that these limited possibilities, together with the possibility that cellular and landline services may compete in the future, do not warrant denial of the proposed merger. The applicants state that the Commission objective should be, as it has been in its review of past mergers, to insure that future competition between cellular and landline carriers is not inhibited. Id. at 124-25.

[71] Id. at 122-23.

[72] Id. at 27.

Discussion

30. McCaw currently provides some interexchange service to its customers within and between some of its cellular service areas. McCaw also owns and leases certain facilities crossing landline exchange boundaries. Unlike AT&T, McCaw does not offer interexchange service generally, but only bundled with cellular service in those regions of the country where it is authorized to provide cellular service. Even if AT&T and McCaw were viewed as competitors, McCaw holds an insignificant share of the market for interexchange services. We find no basis to conclude that McCaw would have the ability to expand its IXC services.[73] We agree with California's Attorney General's conclusion that the proposed AT&T/McCaw merger, insofar as it is a horizontal combination of suppliers of cellular interexchange services, "will have only a minimal impact on the long distance industry, regardless of whether the market for those services is in fact competitive."[74] We note that McCaw's sales within the national wholesale long distance market have been estimated at 0.3%.[75] Assuming an AT&T market share of 60%, the record evidence indicates that the merger would increase the Herfindahl-Hirschman Index ("HHI") by less than 40 points.[76] Even in a highly concentrated market, a horizontal merger

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[73] McCaw's financial status makes it unlikely that, under present circumstances, it would be able to embark on any large-scale investment in interexchange facilities in the foreseeable future. We also note that the words of SW Bell's own experts may cast doubt on McCaw's ability to enter the interexchange market on a significant scale. SW Bell Petition, Affidavit of Professors Salop and Fisher at 20 n. 20 ("[b]ecause of the large economies of scale, most local cellular carriers are likely to suffer a significant cost disadvantage from vertical integration.")

[74] Opinion of California Attorney General at 28 (footnote omitted) (copy attached to "Comments of California Upon Competitive Effects of Proposed Merger within Particular Product and Geographic Markets," filed June 20, 1994).

[75] AT&T and McCaw Opposition, Affidavit of Professor Glenn Ellison at 7 n. 3.

[76] Opinion of California Attorney General, supra, at 28 n. 138. The HHI index is calculated by squaring the market share of each competitor in a market and then adding up the squares. The sum of the squares is an indication of market concentration. This calculation is made with "pre-" and "post-merger" market share data, and the difference measures the increase in market concentration that will result from a merger. The higher the pre-merger number, and the greater the increase that the merger will cause, the more likely the merger is to violate the antitrust laws. See generally FTC v. PPG Industries, Inc., 798 F.2d 1500, 1503

that produces an increase in the HHI of less than 50 points generally does not raise significant antitrust concerns.[77] In addition, McCaw's current financial status, and its future financial prospects if it remains an independent company, might not permit it to construct a significant amount of additional interexchange plant. We find no public interest to be served by treating McCaw's relatively de minimis presence in the current interexchange services market as a significant factor in our consideration of the proposed merger.

31. We also are not persuaded by speculative assertions that AT&T/McCaw would discriminate in favor of its cellular affiliate and against the BOCs either by providing interexchange service to AT&T/McCaw's cellular affiliate at AT&T/McCaw's marginal cost, or by raising the prices charged to its rivals far above cost. Any such scheme would be counter-intuitive because AT&T/McCaw would have no way of knowing that its interexchange revenue losses would be more than offset by gains in its cellular service revenues. For similar reasons, we believe that it is unlikely that AT&T/McCaw would design tailor-made service packages for its cellular affiliate while refusing such customizing for other carriers, or be less than prompt in responding to maintenance and other service requests from its rivals. In addition, we find it unlikely that AT&T/McCaw could successfully engage in predatory pricing. In Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., the Supreme Court implied that similar speculation about such pricing, without more, did not state a case under the antitrust laws.[78]

(D.C.Cir. 1986).

[77] Guidelines at ¶¶ 20,573-6.

[78] In Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588-89 (1986) the Court's discussion of predatory pricing applies as well to the kind of discriminatory conduct that the BOCs predict by AT&T/McCaw in favor of its cellular affiliates:

> [a]ny agreement to price below the competitive level requires the conspirators to forego profits that free competition would offer them. The foregone profits may be considered an investment in the future. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses they suffered. . . . . The future flow of profits, appropriately discounted, must then exceed the present size of the losses. . . . [T]he

32. Several of the BOCs assert that because they are subject to MFJ restrictions, fairness dictates that AT&T/McCaw be subject to similar constraints.[79] In the case of interexchange services, the BOCs advocate that we impose on AT&T/McCaw the same equal access requirements that the MFJ imposes on the BOCs. For several reasons, we reject the proposal, and all others made by the BOCs, of parity for parity's sake. First, the Communications Act does not require parity between competitors as a general principle.[80] Second, MFJ issues are most properly addressed to the court that applies it, or to Congress. Indeed, the BOCs are currently seeking relief in both the MFJ court and Congress.[81] Third, the rationale for the MFJ's limitations on the BOCs -- the existence of a long-entrenched exchange service bottleneck encompassing virtually every home and business in the BOCs' territories[82] -- does not apply to AT&T/McCaw. In the absence of a factual rationale for applying the MFJ to AT&T/McCaw, doing so would be counterproductive. Fourth, assuming, as the BOCs do, that the MFJ restricts competition in undesirable ways, expanding its application to the BOCs' competitors would only compound the harm

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> success of such schemes is inherently uncertain; the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. [Citations omitted.]

See also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. ___, 113 S. Ct. 2578 (1993).

[79] Most of the BOCs urge our consent to the merger but with certain conditions, principally because of the continued existence of the MFJ line of business restrictions. U S West agrees with the other BOCs' view that it is both timely and critical for this Commission to reassert full authority and leadership in the development and implementation of national telecommunications policy. U S West cautions, however, that this proceeding does not provide "the optimal vehicle for undertaking this very serious analysis." U S West Comments at 4.

[80] Hawaiian Telephone Co. v. FCC, 498 F. 2d 771, 776 (D.C. Cir. 1974) (FCC did not conform to public interest mandate in approving applications where it considered the factor of "competition not in terms primarily as to benefit the public but specifically with the objective of equalizing competition among competitors").

[81] See, e.g., Bell Atlantic Petition at 4-5.

[82] United States v. Western Elec. Co., 797 F. 2d 1082, 1088 (D.C. Cir. 1986); United States v. AT&T, 552 F. Supp. at 186-95.

to competition.[83] For all these reasons, we find no rationale for applying MFJ restrictions to AT&T/McCaw.[84]

Regional and National Interexchange Cellular Services

Comments and Other Filings

33. As part of their discussion of the interexchange services market, some BOCs argue that McCaw, prior to merger discussions with AT&T, was the foremost advocate of the view that cellular service has become a regional or even national service.[85] According to these BOCs, McCaw had proclaimed its own goal of "knit[ting] discrete cellular systems and clusters of systems into a seamless web."[86] BellSouth argues that a prototype of building this cluster approach, known as the "City of Florida," is already in place.[87] BellSouth and SW Bell also cite the nationally-known trademark "Cellular One" and its "North American Cellular Network," which McCaw uses where it is the "Block A or non-wireline" licensee, a linkage of separate cellular coverage areas, as evidence of AT&T/McCaw's plans to provide national cellular service.[88] All of the BOCs argue that they are prevented from "knitting" together similar clusters due to the terms of the MFJ, which prohibits them from providing interLATA service and

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[83] One BOC, U S West, expressly notes this possibility. U S West Comments at 3.

[84] BOC divestiture of cellular holdings is also an alternative to seeking relief from the terms of the MFJ. We note that one BOC, PacTel, recently divested its cellular operations, moving them to an independently held company. See AT&T and McCaw Opposition at 38. The new company, AirTouch Communications, which began operating on April 1, 1994, was awarded one the personal communications service ("PCS") licenses at the recent FCC auction of licenses to provide wireless telecommunications in July 1994. However, despite its divestiture of the AirTouch entity, PacTel continues to have a presence in the cellular services market through the recently created "Pacific Bell Mobile Services," which will resell the cellular services of other companies throughout California. See Wall Street Journal, July 15, 1994, at A-4.

[85] See, e.g., BellSouth Reply at 36; SW Bell Petition at 21-23; Ameritech Reply at 2-3.

[86] BellSouth Reply at 37; see also SW Bell Petition at 21-29.

[87] For a description of BellSouth's arguments regarding the "City of Florida," see ¶ 23 and n. 55, supra.

[88] BellSouth Reply at 37; SW Bell Reply at 43.

effectively prevents them from reselling the cellular service of non-BOC carriers.[89]

Opposition to Filings

34. AT&T and McCaw argue that the BOCs' concerns are unfounded. The applicants state that their goal is to provide customers with a "seamless" mobile service that would allow customers to place or receive calls wherever they are located. The applicants maintain that the BOCs can and do offer the same seamless service through roaming arrangements with other cellular carriers pursuant to the MFJ and waivers.[90]

Discussion

35. To the extent that MFJ restrictions currently hinder the BOCs' ability to form such regional clusters for cellular service, we do not believe that we are required to remedy every lack of competitive balance before approving the AT&T/McCaw merger. We believe that these issues should be resolved in the context of addressing MFJ issues, rather than as part of the Commission's decision on this merger. We believe, therefore, that the Commission should approve the AT&T and McCaw transfer of control applications, subject to the conditions of this Order, without resolving the questions of competitive balance raised on the record.

3. Local Cellular Services in MSAs and RSAs

Comments and Other Filings

36. BellSouth contends that McCaw "towers over its rivals" in providing cellular service with its ability to reach 60.4 million potential subscribers in the United States and is 18.9% larger than the second-ranked cellular carrier, GTE.[91] Several parties contend that AT&T/McCaw will be "a single dominant voice in wireless communications,"[92] will have "the most financial muscle available to play a dominant role in the emerging commercial

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[89] See, e.g., BellSouth Reply at 38; SW Bell Petition at 58-59; NYNEX and PacTel Petition at 5-7; Bell Atlantic Reply at 1-2; U S West Comments at 4-5; Ameritech Comments at 14.

[90] Id. at 39-40.

[91] BellSouth Petition at 25.

[92] SW Bell Petition at 15, 35-36; see also Ad Hoc IXCs Petition at 21-22, 26-27.

mobile service marketplace,"[93] and will dictate standards and umbrella prices.[94] SW Bell argues that AT&T/McCaw will leverage its power in both long distance and equipment, to dominate what would otherwise be a highly competitive wireless service market.[95]

Opposition to Filings

37. AT&T and McCaw argue that McCaw is not a "towering" presence in the wireless market. They note that McCaw is the largest cellular carrier by only relatively small margins over GTE/Contel and BellSouth.[96] They state that McCaw has interests in cellular systems that serve about 38% of the country, but that it either has a minority interest in some of these systems or shares control with a BOC in some others. The systems in which McCaw has undivided control, according to AT&T and McCaw, serve approximately 13% of the nation's cellular subscribers.[97] More fundamentally, AT&T and McCaw argue, wireless carriers compete locally, not nationally. They state that in each of McCaw's local service areas, it competes with a cellular affiliate of the BOCs, GTE, or another local exchange carrier ("LEC").[98] AT&T and McCaw note that the standard-setting process is not dominated by the manufacturers or IXCs and claim that the BOCs collectively will have a vastly larger influence in standard-setting than McCaw.[99]

Discussion

38. A large, multi-market corporation does not necessarily preclude the entry or success of competitive firms. Indeed, the wireless communications business is one in which relatively small, entrepreneurial competitors have often been as

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[93] NCRA Petition at 8.

[94] See Bell Atlantic Petition, Affidavit of Richard J. Lynch at 16; Ameritech Comments at 11; SW Bell Petition at 43-44; see also NCRA Petition at i, 3; BellSouth Petition at 26-27 (re AT&T and McCaw's roles in computer chips, PCS, and cordless phones). BellSouth doubts that in the near future any alternative technology will compete with cellular carriers. BellSouth Petition at 28.

[95] SW Bell Petition at 34-36.

[96] AT&T and McCaw Opposition at 27.

[97] Id.

[98] Id. at 28.

[99] AT&T and McCaw Opposition at 117.

successful as large ones such as the BOCs. As we said in Competition in the Interstate Interexchange Marketplace:

> The issue is not whether AT&T has advantages, but, if so, why, and whether any such advantages are so great as to preclude the effective functioning of a competitive market. . . . Such advantages do not . . . mean that these markets are not competitive . . . [or] that it is appropriate for government regulators to deny the incumbent the efficiencies its size confers in order to make it easier for others to compete.[100]

39. We are not persuaded that the combination of interexchange services, manufacturing, and exchange services that will result if the proposed transfer is approved raises anticompetitive dangers identical or even substantially similar to those of the former Bell System.[101] Significantly greater rivalry and competition exist today in the interexchange market than existed under the former Bell System. The most intense competition in the interexchange market is for the loyalty of commercial customers, and most cellular callers are such customers.[102] Nor is the BOCs' historical, ubiquitous wireline exchange bottleneck perfectly analogous to the local cellular service market. Cellular service is relatively new, still serving only a small percentage of the population.[103] Moreover, the existence of two facilities-based carriers has created a degree of rivalry not present in "wireline" exchange services under the former Bell System,[104] and competition

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[100] 6 FCC Rcd 5880, 5891-92 (1991).

[101] See Ad Hoc IXCs Petition at 14-15; BellSouth Petition at 2, 4, 27.

[102] See, e.g., Competition in the Interstate Interexchange Marketplace, 5 FCC Rcd 2627, 2632, 2634, 2638 (1990) (interstate interexchange competition most marked for commercial customers), 6 FCC Rcd 5880, 5881, 5887, 5890-92 (1991) (same); and La Star Cellular Tel. Co., 4 FCC Rcd 3777, 3779 (1989) ("Most CELLULAR companies serve a wide variety of CUSTOMERS, including BUSINESSES of all types, professionals, and social and emergency services") (capitalization in orginal).

[103] BellSouth Petition at 4 n. 5 ("the cellular industry has tapped only 5 percent of its potential customer base to date").

[104] Even after the proposed merger there will be two cellular licensees in each MSA or RSA, as well as many potential resellers because of low barriers to entry.

from other wireless systems, such as PCS, is on its way. Finally, the cellular network equipment market is significantly less concentrated than the telecommunications network equipment market was ten years ago. In sum, the trends toward competition in these markets are significantly more pronounced than they were in 1983 on the eve of the Bell System divestiture. The conditions we are placing on the proposed acquisition in this Order reflect the lesser degree of anticompetitive danger that we observe in the current marketplace.

40. Also, we are taking steps to make wireless telecommunications in this country more competitive. We anticipate that the advent of PCS will open the commercial mobile radio services ("CMRS") marketplace,[105] which includes cellular service, to intense competition.[106] The large number of companies that have expressed interest in PCS licenses allays the concern we might otherwise have with "potential competition"[107] between McCaw in cellular and AT&T in PCS.[108] Later this year, we expect to license several broadband PCS carriers in each area of the country, carriers that we expect will compete with existing cellular carriers.[109]

41. In addition, we believe that changing technology will enable CMRS licensees to use their licensed spectrum to provide competing services that respond to consumer demand. For example, wide-area specialized mobile radio (SMR) service

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[105] See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Commercial Mobile Radio Services, 9 FCC Rcd 1411 (1994)("CMRS Second Report and Order").

[106] Amendment of the Commission's Rules to Establish New Personal Communication Service, 7 FCC Rcd 5676, 5688 (1992) (estimating a potential sixty million PCS users in the United States within ten years); see also USA v. Western Electric Co., Civil Action No. 82-0192 (HHG), "Memorandum of Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, and Southwestern Bell Corporation in Support of Their Motion to Vacate the [MFJ] Decree" at 61 (filed July 6, 1994) (PCS service abroad already has caused cellular carriers there to slash their rates).

[107] See United States v. FCC, 652 F.2d 72, 100-02 (D.C. Cir. 1980)(en banc).

[108] Even with AT&T's potential role in the development of PCS limited because of its affiliation with McCaw, we anticipate no shortage of significant entrants into PCS.

[109] See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services, 8 FCC Rcd 7700, 7709 (1993).

illustrates the dynamic nature of the CMRS marketplace. In 1990, Fleet Call (now Nextel) filed a petition for waiver of existing Commission rules and other relief to permit creation of wide-area digital SMR systems in six markets.[110] Wide-area SMR service could develop as a competitor to the cellular industry, with Nextel beginning to offer service in competition with cellular carriers in California markets.[111]

4. Manufacture of Cellular Network Equipment for Use in North America

Comments and Other Filings

42. BellSouth, SW Bell, and Bell Atlantic contend that AT&T has "either the largest or second-largest share of the cellular equipment" sold in the U.S., depending on the data used.[112] Each of these BOCs estimates that AT&T's share of the market ranges from 30% to 40%.[113] In addition, according to BellSouth, in the 30 largest markets, AT&T switches are used in more than 50% of the wireline cellular systems.[114]

43. SW Bell also states that McCaw is the nation's foremost buyer of wireless network equipment, with Ericsson as its largest manufacturer of McCaw network equipment (45%), AT&T the second largest (22%), and Motorola the third largest (7%). SW Bell argues that after the merger, through increased sales to McCaw, AT&T's share of new equipment sales in the U.S. will rise above

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[110] Fleet Call, Inc., 6 FCC Rcd 1533 (1991).

[111] Nextel began wide-area SMR service in Los Angeles in early 1994 with 125 base stations. Nextel also plans to begin providing wide-area SMR service in New York and Chicago in 1994. See "MCI to Buy 17% of Nextel, Will Market Wireless under MCI Name," PCIA Bulletin, Mar. 4, 1994, at 5. Nextel also has announced commercialization of its all-digital, integrated wireless network in the San Francisco Bay area and in California's Sacramento Valley. "Together with the recently inaugurated network in Los Angeles [and networks scheduled for central California and San Diego], these systems will provide integrated telephone, private network dispatch radio, paging and messaging services throughout most of the state of California." Business Wire, July 8, 1994.

[112] BellSouth Petition at 25; accord SW Bell Petition at 34-35; Bell Atlantic Petition at 6, 8.

[113] BellSouth Petition at 25 (33%); SW Bell Petition at 34-35 (40%); Bell Atlantic Petition, Lynch Affidavit at 2 (30-40%)

[114] BellSouth Petition at 25.

50%.[115] All of the BOCs, except U S West, allege that AT&T will cause McCaw to procure only cellular networks made by AT&T, regardless of quality and to the detriment of other manufacturers. This, they argue, will be particularly damaging to Ericsson, from which McCaw has purchased most of its current networks.[116]

44. SW Bell further contends that because switches by one manufacturer can only communicate with cells made by that manufacturer, the purchaser is "locked" into that manufacturer for new equipment for the same service area.[117] Under these circumstances, SW Bell argues that AT&T/McCaw could raise prices for its equipment and software and associated maintenance and service to its "locked-in" wireless competitors without losing them to other equipment providers.[118] SW Bell also argues that AT&T/McCaw also will cause irreparable harm to its competitors by withholding the introduction of new features as well as delaying maintenance and service. In addition, SW Bell argues that AT&T will be able to use its market dominance to AT&T/McCaw's advantage to influence the industry standards for mobile switches and other equipment.[119]

45. SW Bell further argues that AT&T/McCaw will have the incentive to abuse the information it gathers as a provider of long-distance service and wireless equipment and software to disadvantage its rivals. SW Bell contends that AT&T/McCaw will have

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[115] SW Bell Petition at 34-35.

[116] Id. According to SW Bell, McCaw uses Ericsson networks in areas that account for approximately 60% of its potential customers, AT&T for approximately 20%, Motorola for approximately 15%, and Northern Telecom for approximately 5%. Id. at 34-35.

[117] Id. at 39. SW Bell states that it would be extremely expensive to change equipment providers in significant markets, where a cell site costs $750,000 and a switch costs $7 million. SW Bell argues that changing equipment providers also disrupts the delivery of service to customers. Id. at 40.

[118] Id. at 41. SW Bell contends that this likely would force AT&T/McCaw's cellular competitors to raise the prices of their service. Id.

[119] Id. at 43-44. According to SW Bell, FCC disclosure requirements are tailored to prevent anticompetitive consequences of alliances that involve only landline LECs, not cellular providers such as McCaw. In addition, SW argues, AT&T is currently subject to disclosure rules for changes made to its long-distance network, but these requirements likely would not apply to wireless equipment and software operations within a vertically integrated company. Id. at 44-45.

access to and an incentive to use the bulk of the BOCs' wireless customer lists, including significant usage information, to solicit BOC customers to switch to AT&T/McCaw's wireless service.[120] Third, SW Bell contends that AT&T, as an equipment supplier, has access to a significant amount of SW Bell's proprietary information.[121]

Opposition to Filings

46. AT&T and McCaw state that AT&T's share of total U.S. cellular network equipment revenues was about 30% in 1992, which, they argue, is not indicative of "dominant market power."[122] AT&T and McCaw argue that they face "vigorous" competition from other equipment manufacturers, including Ericsson, Motorola, and Northern Telecom, and that most of the BOCs' existing cellular equipment was purchased from manufacturers other than AT&T.[123] AT&T and McCaw further argue that even if cellular equipment manufacturers other than AT&T are foreclosed from selling to McCaw, they could still compete vigorously because McCaw controls only about 13% of U.S. domestic purchases.[124]

47. AT&T and McCaw argue that to obtain 50% of the market in cellular network equipment, as postulated by SW Bell, AT&T would have to keep existing BOC and other cellular carrier customers, something that could only happen if the BOCs and others remained satisfied AT&T customers.[125] AT&T and McCaw state that the BOCs were responsible for three-fourths of AT&T Network Systems' total 1992 sales, and they argue that the BOCs could shift their purchases elsewhere if AT&T were to unduly discriminate against

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[120] Id. at 46. SW Bell further contends that there are no existing regulations that would preclude AT&T from sharing this customer information with its own wireless division. Id. at 47.

[121] Id. at 68. SW Bell states that this proprietary information includes: (1) billing data base access for identifying heaviest users; (2) data base information on where customers use their phones the most; (3) calling pattern and routing data; (4) future technology plans; (5) growth forecasts; (6) network design information; (7) data on system problems and coverage gaps; (8) networking arrangements; (9) ideas for improvements to AT&T's software; (10) information on company strengths and weaknesses. Id. at 69.

[122] AT&T and McCaw Opposition at 91. AT&T and McCaw note that BellSouth's own data also suggest a 30% share. Id.

[123] Id.

[124] Id. at 96.

[125] Id. at 93.

them with respect to cellular network equipment.[126] AT&T and McCaw maintain that the merger actually will heighten competition by causing AT&T to bid more aggressively to prevent "apprehensive customers" from establishing or expanding relationships with other equipment providers.[127]

48. The applicants maintain that AT&T would have no incentive to deny its cellular competitors features and functions available elsewhere, or fail to disseminate network change information on a timely basis, because such conduct would cause AT&T to lose its large customers for cellular network equipment. AT&T and McCaw further argue that the cellular systems that AT&T would purportedly discriminate against are operated by firms that are either partners with McCaw in some systems or generally provide cellular services in areas where they do not compete with McCaw.[128] In addition, AT&T and McCaw further argue that their contracts do not allow them to charge different prices or provide different upgrades to customers located in two different areas.[129]

49. AT&T and McCaw contend that they would not be able to exploit AT&T's position as a provider of cellular equipment to the BOCs, because there is no BOC "lock-in" to AT&T's equipment, and AT&T would not jeopardize its equipment business to pursue highly speculative short-term gains for McCaw.[130] AT&T and McCaw maintain that it is common to change equipment as systems evolve, and the costs of such a change are not prohibitive.[131] AT&T and

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[126] Id. at 93-94. In addition, AT&T and McCaw contend that AT&T could also be precluded from becoming a major supplier of equipment for future PCS systems. Id. at 105.

[127] Id. at 96-97.

[128] Id. at 68.

[129] Id. at 103.

[130] Id. at 98. AT&T and McCaw argue that the BOCs' "lock-in" claims could arise in only 17 markets in which a BOC, using AT&T equipment, competes with McCaw. In the 60 or more markets where a BOC, supplied by AT&T, competes with a cellular provider other than McCaw, AT&T and McCaw argue that they would have little incentive to harm the BOCs competitively. Id. at 103. According to AT&T and McCaw, SW Bell lists 23 AT&T-equipped MSA wireline systems that compete against McCaw, with only 17 of these systems owned by a BOC. AT&T and McCaw argue that this leaves 289 MSAs where AT&T has no ability to help McCaw by harming a BOC. Id. at 104.

[131] Id. at 99. AT&T and McCaw state that a recent standard adopted by the Telecommunications Industry Association, IS-41, permits a cellular provider to operate two manufacturers' systems

McCaw also maintain that the BOCs can protect themselves against a perceived "lock-in" and associated price increases by negotiating contract provisions.[132]

Discussion

50. AT&T and McCaw are not competitors in the manufacture of cellular network equipment. Accordingly, the proposed transfer would in no sense eliminate a competitor from that market.

51. As for AT&T's alleged market power in the network equipment market, we note that the antitrust laws recognize that a high market share is not incompatible with a high degree of competition.[133] A company's high market share may be inoffensive if the relevant market has many potential entrants -- where, if the company attempted to raise price, lower quality, or fail to innovate, a new competitor could enter the market promptly, offer competitive prices and quality, and thus frustrate the first company's anticompetitive plan.[134] We find that there are, in fact, numerous companies, both domestic and foreign-based, that have entered the network market in the United States, or could do so with relative ease if AT&T increased prices for its cellular equipment or if foreign manufacturers offered network equipment at lower prices.[135] For these reasons, the current and potential future market share of AT&T/McCaw in the network equipment manufacturing market does not cause us great concern.

52. The BOCs speculate that AT&T/McCaw will treat its cellular subsidiaries as captive customers, forcing them to buy AT&T networks even when better or cheaper ones are available

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simultaneously within a mobile service area. According to AT&T and McCaw, an IS-41 interface could be used to phase in gradually a new equipment system. Id. at 99-100.

[132] Id. at 101-02.

[133] See, e.g., Competition in the Interstate Interexchange Marketplace, 6 FCC Rcd 5880, 5887, 5890 (1991).

[134] See Guidelines, 4 Trade Reg. Rep. (CCH) at ¶¶ 20,573-9 to -11; General Electric Co., 4 FCC Rcd 8207, 8209 (1989).

[135] These include Alcatel, GM Hughes Electronics, Mitsubishi, Nokia Dy, Philips, Plexsys, Siemens, Stromberg-Carlson, Goldstar, Hyundai, and Samsung. See AT&T and McCaw Opposition at 91-92; id., Affidavit of Lawrence A. Sullivan at 7-9; id., Affidavit of Stephen B. Haggerty at 4.

elsewhere.[136] We find such conduct by AT&T/McCaw unlikely because it would not be profit-maximizing. Assuming AT&T equipment was second-rate or over-priced, McCaw would, first, incur enormous costs by prematurely scrapping its Ericsson networks and substituting ones made by AT&T. Second, McCaw's cellular service would suffer from AT&T's hypothetically poor or expensive network. McCaw would lose customers, and AT&T would suffer a net economic loss.[137] Finally, AT&T forcing McCaw to buy inferior networks from it would be financially beneficial to AT&T only if McCaw had control over the cellular service market (so that it could force its customers to stay with the inferior service provided on AT&T's network). Of course, the customers could go to McCaw's competitor (such as a BOC), so the financial loss that McCaw would suffer would make the whole venture unprofitable for AT&T/McCaw. Thus the BOC speculation lacks plausibility. It is well settled under the antitrust laws that a party opposing summary judgment and seeking a trial (which is the posture of the opponents of the merger here) "must do more than simply show that there is some metaphysical doubt as to the material facts"; and "if the factual context renders respondents' claim implausible -- if the claim is one that simply makes no economic sense -- respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."[138] We conclude that petitioners have not done so here.

53. Our conclusion that the risk of such anticompetitive activity by AT&T/McCaw in the network equipment manufacturing market is slight is buttressed by the fact that no manufacturer of cellular networks has opposed the proposed transfer. Presumably, these companies (and especially Ericsson, McCaw's primary network supplier) would have the keenest sense of any real danger to their interests. The fact that not one manufacturer has participated or sought to intervene in this proceeding leads us to believe that the risk of anticompetitive behavior in this market is minimal.

54. The BOCs also express concern about the network "aftermarket" of maintenance, repair, additional towers, and software upgrades in the future. More specifically, they argue that AT&T will discriminate in favor of its cellular affiliates, and especially against McCaw's competitors that use AT&T networks, in pricing, quality, and promptness of delivery. In addition, the BOCs fear that such discrimination would go unpunished by

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[136] We fail to see any competitive concern with such conduct if AT&T's networks are the best available and lowest priced.

[137] This loss would occur even if McCaw waited to substitute its existing Ericsson networks for new AT&T networks over time.

[138] Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986).

marketplace forces due to the "lock in" effect.[139] The Supreme Court noted this possibility in an analogous case, Eastman Kodak Co. v. Image Technical Services, Inc.[140] There, the Court found that, in certain circumstances, an unscrupulous equipment seller can have enough market power to force equipment purchasers to pay supracompetitive prices for post-purchase service involving the equipment.[141]

55. We conclude that the "lock in" effect and the potential for discrimination in the cellular network aftermarket is not likely to be significant in the future. With future purchases, marketplace forces are likely to prevent aftermarket discrimination of the kind envisioned by the BOCs. Purchasers of cellular networks, especially the BOCs, tend to be large, sophisticated, powerful buyers with substantial bargaining power. They can discount their long-term costs of maintaining the AT&T network equipment by a "discrimination risk factor," or can attempt to negotiate "most favored nation" (customer) clauses or other protections in future contracts with AT&T/McCaw. Or, on the other

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[139] We find that while the possibility of a "lock in" effect does exist, the parties tend to overstate its significance. Carriers can change network suppliers, although it is often difficult and expensive. Nevertheless, there is a significant period of time after a network has been installed that economics preclude its operator from ordering a new one from a different supplier.

[140] 504 U.S. ___ 119 L. Ed. 2d 265, 289-90 (1992).

[141] The Court rejected Kodak's claim that it could not profitably discriminate against customers who had purchased its copier equipment in a "service" aftermarket:

> A . . . factor undermining Kodak's claim that supracompetitive prices in the service market lead to ruinous losses in equipment sales is the cost to current owners of switching to a different product. If the cost of switching is high, consumers who already have purchased the equipment, and are thus "locked in," will tolerate some level of service-price increases before changing equipment brands. Under this scenario, a seller profitably could maintain supracompetitive prices in the aftermarket if the switching costs were high relative to the increase in service prices . . . .

Id. (citation and footnote omitted); see also Digidyne Corp. v. Data General Corp., 734 F.2d 1336, 1341-44 (9th Cir. 1984), cert. denied, 473 U.S. 908 (1985).

hand, they can contract with numerous other suppliers. If AT&T/McCaw discriminates against purchasers of its cellular network equipment, that practice likely would become known and will surely damage AT&T/McCaw's network sales.

56. We do, however, find the lock-in effect and potential for aftermarket discrimination to be significant impediments to cellular carriers that have existing network contracts with AT&T.[142] Such contracts were negotiated in an environment in which AT&T was unaffiliated with McCaw and the BOCs had no reason to fear discrimination in McCaw's favor and against them. In the short-term operation of the marketplace, therefore, protections initiated by the purchaser of the cellular network equipment will likely be absent. As discussed in greater detail below, we will impose, as a condition on our grant of the applications, a requirement that there be no unreasonable discrimination in the provision of products and services by AT&T/McCaw against purchasers of cellular networks under contracts in effect on the release date of this Order.[143]

5. Pro-Competitive Effects of the Proposed Merger

57. The pro-competitive effects of a merger can be as important to our competitive analysis as the anticompetitive effects. We conclude that the proposed transfer will have important pro-competitive aspects that weigh heavily in our public interest calculus. The applicants' equal access commitments will add choices and competition for the interexchange usage of McCaw's customers (who now have no choice of interexchange carrier). The merger will allow McCaw to use AT&T's strong brand name and its marketing and sales force. Each of the applicants also will have an opportunity to cross-sell or bundle its service with the other's products and services. Moreover, AT&T and McCaw will each be able to rely on the other's significant technological capabilities.[144] In short, the AT&T/McCaw merger will bring a strengthened competitor into the cellular service arena.[145] As a result, we expect the AT&T/McCaw merger to lead to a broadened range of

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[142] See, e.g., SW Bell Reply at 59 (noting that its cellular subsidiary recently installed new AT&T systems in major markets).

[143] See ¶ 182, infra. We would impose the same condition stated in the text even if we had found the relevant geographic market for competitive analysis of the proposed merger to be broader than use in North America.

[144] AT&T and McCaw Opposition at 24, 34.

[145] See United States v. FCC, 652 F.2d 72, 96-97 (D.C. Cir. 1980) (en banc).

consumer choices, more price competition, an increased responsiveness to consumer needs and desires on the part of competing carriers and potential entrants, as well as incentives for continued technical and service innovations in the cellular service business.

58. The merger will also preserve the independence of the largest "nonwireline" cellular carrier that is not controlled by a "wireline" telephone company (such as the BOCs or GTE). AT&T/McCaw's presence will continue a significant non-wireline presence in the cellular industry. On matters such as interconnection, we find that the continued existence of a powerful competitor like AT&T/McCaw with no current affiliation with wireline telephone companies can serve the public interest. Such an independent influence in the industry can be expected to improve interconnection agreements with wireline telelphone companies, to the benefit of all cellular carriers and users. If cellular service ever has the potential to compete directly with traditional "wireline" telephone service, the existence of a cellular carrier such as AT&T/McCaw appears likely to ensure that that possibility becomes a reality sooner than might otherwise be the case.[146]

59. Through the merger, AT&T will also gain valuable knowledge of how to provide cellular service to end-users on a daily basis. This knowledge will increase both AT&T/McCaw's international competitiveness as a seller of cellular network equipment and its position as a cellular service provider in other countries.[147] In addition, equal access obligations resulting from subsequent Commission orders and/or AT&T and McCaw's voluntary equal access commitments will bring competition for interexchange services to AT&T/McCaw's customers.

60. In approving this transaction, we reaffirm our commitment to creating new opportunities for competitive provision of local telecommunications services, which local exchange telephone companies such as the BOCs traditionally have provided on a monopoly basis. We believe our action here will enable McCaw to compete more vigorously with the BOCs, as a facilities-based cellular licensee and as a reseller of regional, inter-LATA or IXC services, in local cellular markets. Further, because of the rapid development of new technologies, including digital cellular, we expect McCaw could be a formidable competitor as well in the emerging regional interexchange cellular marketplace. We perceive

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[146] See Vanguard Cellular Systems, Inc. ("Vanguard") Comments at 13.

[147] McCaw currently has greater experience than AT&T in deploying and operating cellular systems, including in foreign countries. AT&T and McCaw Opposition, Affidavit of James L. Barksdale at 23.

this decision as another significant step in fostering the economic growth of our nation, one that encourages AT&T's and McCaw's investment in this nation's telecommunications infrastructure. This merger, subject to the conditions we now impose, also has the potential of bringing U.S. consumers increased access to new telecommunication services at lower prices.[148]

61. In sum, and for reasons explained more fully subsequently in this Order, we conclude that, as conditioned, the proposed transfers' likely pro-competitive results outweigh any potential anti-competitive results. We believe that with the conditions we set forth in the following sections, the AT&T/McCaw merger will serve the public interest, convenience, and necessity. We are aware that several conditions that we decline to impose on the proposed merger are part of a stipulated proposed final judgement in the above-mentioned DOJ antitrust suit against the proposed merger. For example, under the Stipulation, after a McCaw cellular system is converted to equal access, it must cease providing service as an IXC. For reasons discussed in this Order, we find that we need not impose all the conditions specified in the Stipulation as a precondition to our approving the proposed merger pursuant to the "public interest" standard of Section 310(d) of the Act. Nevertheless, we conclude that the proposed merger would still be in the public interest even if all the conditions of the Stipulation, without modification, were to be adopted by the U.S. District Court. We re-emphasize our continuing ability to monitor developments resulting from this merger and our ability to take remedial action if, contrary to our expectations, anti-competitive results occur."

C. Proposed Conditions

62. As noted above, most of the parties who filed petitions or comments herein proposed not that we deny the proposed merger, but that we place conditions on it. These proposed conditions cover a large number of subjects and are claimed to be based on either the antitrust laws or the broader public interest standard of the Communications Act. We discuss each of these proposed conditions below. We find a sufficient basis to impose only certain conditions that have been proposed including: (a) bundling, (b) sales of cellular network equipment under existing contracts, and (c) the use of proprietary information.

1. Equal Access

63. A number of parties have asked that we impose equal access requirements on AT&T/McCaw as a condition of our approval of

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[148] See CMRS Second Report and Order, 9 FCC Rcd at 1419.

the applications.[149] "Equal access allows end users to access facilities of a designated interexchange carrier (IXC) by dialing '1' only."[150] The MFJ imposes equal access obligations on the BOCs, including their cellular affiliates.[151] Other cellular licensees and CMRS provider that are not currently required either by court order or this Commission to provide equal access.[152] Certain BOCs, Allnet, and MCI seek to condition the proposed merger on AT&T/McCaw's providing equal access through its cellular systems.[153] In response to these submissions, AT&T and McCaw have offered their own voluntary equal access plan.

Comments and Other Filings

64. According to AT&T and McCaw, McCaw systems that serve 13% of all cellular subscribers currently presubscribe to AT&T for long distance services and do not offer equal access.[154] AT&T and McCaw offer to implement two elements of equal access for these systems. First, AT&T/McCaw will establish calling areas that are comparable in size to the areas that the MFJ defines for the BOCs, except where McCaw has a single switching system that serves a multi-LATA area that the BOCs have not been authorized to serve. Second, AT&T/McCaw will allow all customers to choose

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[149] On June 23, 1994, Bell Atlantic filed a motion for leave to file as part of the record in this proceeding a letter from Richard L. Rosen, Chief, Communications & Finance Section, Antitrust Division, Department of Justice, to Michael K. Kellogg regarding the conditions upon which the DOJ will support the BOCs' request for generic wireless relief in the form of a waiver of the MFJ. We grant Bell Atlantic's motion.

[150] Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911, 911 (1985) (end user also has the capability of using other IXCs by dialing access codes); see also CMRS Notice, 9 FCC Rcd at ___ [¶ 85].

[151] United States v. AT&T, 552 F. Supp. at 227 (MFJ requires the BOCs, including their cellular affiliates, to offer access to the local exchange network to all interexchange carriers, which is "equal in type, quality, and price" to that offered to AT&T and its affiliates).

[152] CMRS Notice, 9 FCC Rcd at ___.

[153] See, e.g., Ameritech Comments at 2, 16; SW Bell Petition at 76; Bell Atlantic Petition at 1; Allnet Comments at 2; MCI Comments at 2.

[154] Systems in which McCaw shares control with a BOC currently provide equal access to long distance carriers. AT&T and McCaw Opposition at 53.

interexchange carriers other than AT&T. Specifically, AT&T/McCaw will, prior to the "cutover" of each system,[155] notify all current customers of their right to designate or use an interexchange carrier of their choice. AT&T/McCaw will also ballot new customers concerning their interexchange carrier of choice.[156] AT&T and McCaw state that the expense of balloting existing customers now cannot be justified when balloting may be again required if the Commission's rules are amended.[157] They further maintain that the BOCs have proposed other conditions derived from MFJ equal access requirements that apply to BOCs. AT&T and McCaw argue that these conditions are largely designed to prevent local monopolies from steering captive customers to affiliates and are not relevant to non-LEC cellular services.[158]

65. BellSouth, SW Bell, NYNEX, and PacTel support equal access requirements and have expressed concern over AT&T and McCaw's plan. BellSouth argues that AT&T negates its apparent commitment to creating equal access calling areas comparable to those of the BOCs by excluding McCaw systems not already designed to conform to these boundaries.[159] Similarly, SW Bell asserts that AT&T and McCaw's equal access commitment is insufficient because they do not pledge to follow LATA boundaries when competing with BOC affiliates or to support expansion of cellular calling areas for the BOCs.[160] NYNEX and PacTel strongly support an equal access plan that limits calling areas for AT&T/McCaw to those established for the BOCs by the MFJ.[161] In addition, SW Bell argues that AT&T and McCaw refuse to renounce the bundling of local and long distance wireless service at prices below wholesale.[162] Further, SW

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[155] While AT&T and McCaw do not precisely define the term "cutover," we interpret this term to mean the point in time at which a particular local cellular system is converted to the technical capability to provide equal access. AT&T and McCaw note that they intend "to complete the process as quickly as [they] reasonably can in view of the number of switches that are to be converted, the availability of necessary equipment upgrades from other vendors and similar such factors."

[156] Id. at 56-58.

[157] Id. at 57-58.

[158] Id. at 58-59.

[159] BellSouth Reply at 26.

[160] SW Bell Reply at 55.

[161] NYNEX and PacTel Petition at 7.

[162] SW Bell Reply at 56.

Bell argues that AT&T's equal access plan is inadequate because it does not propose to provide information about the available options to existing customers or to ballot them.[163]

66. Several BOCs also seek other refinements to AT&T and McCaw's equal access plan. SW Bell urges the Commission to adopt conditions to prevent discriminatory interconnection to AT&T/McCaw's facilities and to require both advance notification to the interexchange carriers of any network changes likely to affect their services and marketing restrictions necessary to ensure that AT&T/McCaw personnel do not "automatically steer customers to AT&T's own long distance service."[164] NYNEX and PacTel support advance notification to other carriers or equipment providers of any network changes on the same timetable applicable to BOC wireless operations.[165]

67. Finally, certain commenters assert that a firm timetable should be established for implementation of equal access. BellSouth complains that AT&T and McCaw have not committed to when or how quickly equal access will be implemented after the merger is consummated and argues that AT&T and McCaw even imply that they do not plan to implement equal access unless the Commission imposes such requirements on the industry.[166] MCI urges the Commission to require an immediate "freeze" on expansion of McCaw's local calling areas, and a firm timetable for implementation of "landline-LEC-equivalent" equal access at each McCaw local exchange. MCI also asks that AT&T/McCaw be required to present a plan for providing interexchange carriers' equal access to information in cellular databases needed to route calls to the appropriate destination.[167]

Discussion

68. In the CMRS Notice,[168] we initiated a comprehensive examination of the extent to which equal access obligations should apply to the CMRS marketplace. We tentatively concluded at that time that we should impose equal access obligations on cellular

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163 Id. at 57.

164 SW Bell Petition at 76-78.

165 NYNEX and PacTel Petition at 7.

166 BellSouth Reply at 27.

167 MCI Comments at 5-6.

168 CMRS Notice, 9 FCC Rcd at __.

licensees.[169] In urging us to impose equal access obligations and calling area restrictions essentially equivalent to those of the BOCs under the MFJ, the BOCs base their arguments on the presumed need to establish competitive parity. They have not, however, shown that the AT&T/McCaw merger would change the nature and composition of the market in such a way as to warrant subjecting AT&T/McCaw to the restrictions that the BOCs seek. Further, the BOCs have failed to convince us that they and AT&T/McCaw will be similarly situated competitors. The equal access requirements imposed on the BOCs by the MFJ and our rules at the time of the Bell System divestiture were intended to ensure that all IXCs would have the opportunity to obtain local access service equivalent to that provided to AT&T, thereby allowing consumers to choose among the available IXCs. These rules were the cornerstone of the new interstate competitive regime. The record here does not raise the same concerns about competition and consumer choice.

69. AT&T and McCaw have voluntarily offered to implement a form of equal access that reasonably appears to enhance consumer choice. First, they have agreed to ballot new customers regarding the customer's choice of a presubscribed interexchange carrier. They have also agreed to notify all existing customers that they may choose a presubscribed interexchange carrier. In addition, AT&T and McCaw have offered to establish local calling areas[170] that are comparable in size to the areas that the MFJ defines for the BOCs, except where McCaw has a single switching system that serves a multi-LATA area that the BOCs have not been authorized to serve. We note that AT&T and McCaw have agreed to implement a similar form of equal access under the proposed final judgment recently submitted to the district court in United States v. AT&T, No. 94-01555 (HHG) (D.D.C., filed July 15, 1994).

70. We are not persuaded by petitioners that we should impose equal access requirements as a condition of our approval of the proposed merger. The issue whether some or all CMRS providers will be subject to equal access requirements will be resolved in

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[169] Id. at ____ [¶ 35].

[170] We note that the Communications Act defines the related terms "telephone exchange service" and "telephone toll service." Under Section 3(r) of the Act, "'[t]elephone exchange service' means service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge." 47 U.S.C. § 153(r). "Telephone toll service" is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service." Id. § 153(s).

our comprehensive CMRS Notice proceeding. We do, however, expect AT&T and McCaw to honor their voluntary equal access commitments, particularly their agreement with the DOJ to "abide by and comply with the provisions of the proposed Final Judgment pending entry of the Final Judgment."[171]

2. Bundling and Packaging

a. Cellular and Interexchange Services

Comments and Other Filings

71. The BOCs and MCI maintain that AT&T still retains substantial power in the interstate, interexchange market.[172] According to these parties, AT&T/McCaw will be able to evade our regulations governing rates by bundling wireline and wireless rates.[173] The BOCs and MCI contend that if AT&T is allowed to bundle long distance with cellular services, it will be able to leverage its market power in the former market to the detriment of competition in the latter. The BOCs argue that AT&T/McCaw will charge its newly-acquired cellular customers long distance rates based on its marginal unit costs while continuing to base its rates for all other customers on average unit costs. They further argue that any revenue shortfalls occasioned by the low rates for its cellular customers would be recovered by applying higher rates to competitive cellular systems and to the general public at large.

Opposition to Filings

72. AT&T and McCaw argue that the merger will actually eliminate the advantages that McCaw allegedly will obtain from bundling by giving all interexchange carriers equal access to McCaw's customers, something they do not now have.[174] They also note that AT&T/McCaw would offer local cellular and long distance services separately, and, to the extent bundling would be an option, competing interstate IXCs would have equivalent bundling opportunities of their own. Finally, with respect to claims that the merger would lead to price discrimination aimed at McCaw's competitors, AT&T and McCaw argue that the merger will have no effect on McCaw's long distance pricing. They argue that AT&T is not a monopoly, a condition necessary to exercise the type of price control the commenters predict. They further argue that their willingness to apply the affiliate transaction rules to all future

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171 Stipulation at 1.

172 See, e.g., BellSouth Petition at 57.

173 SW Bell Petition at 50-54.

174 AT&T and McCaw Opposition at 74.

dealings between AT&T and McCaw is further assurance that such price discrimination will not occur.[175]

Discussion

73. Where the charges for two or more separate telecommunication services are combined into a single charge, or a "through" rate, the services may be said to be "bundled." The customer pays a single composite charge for a particular through service rather than two or more different charges for services that might be provided by different companies. AT&T/McCaw proposes to bundle cellular and landline interexchange services. The bundled offering resembles message telecommunications services (MTS) that are offered to the public on a through-rate basis. That is, the customer is billed on the basis of a single-rate schedule regardless of the number of common carriers or common carrier systems involved. AT&T's MTS, for example, consists of long-haul transmission services provided by AT&T and local area transmissions services, called interstate access services, provided by LECs. Even though AT&T pays for the LEC access service on a per-minute or per-month basis in accordance with the LECs' FCC-tariffed rates, the end user of AT&T's MTS sees only a composite per-call charge. In other words, the long-haul and local access portions of the services are melded into a single-rate schedule. Were this not the case, the end user would pay what is known as end-on-end rates; that is, one rate up to the boundary of the end user's local network, a separate rate for the long-haul portion, and, finally, a third rate for the termination of the call in another LEC's local area. Among other obvious user inconveniences associated with such a pricing scheme, end-on-end rates would make it impossible to design flat rates applicable to a large area without regard to mileage or geography, i.e., postalized rates, either on a nationwide or regional basis.

74. Currently, many non-BOC cellular carriers offer cellular service in combination with long-distance service on a through-rate basis. Under such arrangements, the cellular carrier acts as a reseller of the landline long distance services of such carriers as AT&T or MCI. The BOC-affiliated cellular carriers, however, are unable to offer combinations of these services, because of the MFJ's prohibition on BOCs either engaging in interstate interexchange service or reselling long distance service to offer their cellular customers through rates. This prohibition appears to be the basis for the BOCs' quest to restrain AT&T/McCaw similarly.[176] We can conceive of no sound basis to impose regulatory restraints upon AT&T/McCaw solely to neutralize the effects of constraints imposed on the BOCs by the MFJ court.

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[175] Id. at 62, 63, 75.

[176] See, n. 56, supra.

Rather, we must view the instant bundling questions on their own merits.

75. The arguments advanced by the BOCs and MCI here provide little reason to believe that cellular/long distance bundling would have anticompetitive effects. The bundling involved here, moreover, may have clear advantages for the public. As previously noted, many non-BOC cellular carriers, including McCaw, now employ bundling to effect through rates for cellular users. Denying bundled rates to cellular users would not only result in denying customers the availability of postalized rates and a single billed rate per call, but it could also limit customers' ability to minimize their telephone charges. As AT&T and McCaw note, many large cellular customers now bundle their cellular use with landline usage to avail themselves of bulk or volume-discount savings.[177] Similarly, small users would be denied the benefits of lower long-distance rates that can be obtained through negotiations between the cellular carrier and the IXC for volume-discounted rates. Thus, in view of the increasing degree of interconnection between wireline and various wireless telecommunications systems, facilities, and services, we would deny users the current and prospective benefits of bundling only if presented with a compelling public interest justification. We find that such a compelling justification is absent on this record.

76. The Commission has adequate regulatory authority through our complaint process to address the types of concerns raised by commenters without the need for additional special rules or conditions. For example, we would scrutinize under Section 202(a) of the Act any allegedly unreasonable preference given by AT&T/McCaw to McCaw customers, to the unreasonable prejudice of its competitors.[178] This provision prohibits AT&T/McCaw from

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[177] AT&T and McCaw Opposition at 77 & n. 150.

[178] Section 202(a) states:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue unreasonable prejudice or disadvantage.

unreasonably charging customers different or lower rates for services like those they provide other similarly-situated customers, including resellers.[179] Additionally, should we find that conditions or terms of service, rate structures, or other practices governing AT&T/McCaw's treatment of McCaw's customers are unreasonable or unduly discriminatory and in violation of Section 201(b) or Section 202 (a) of the Act, we have authority to award damages and to impose forfeitures or other sanctions.[180]

77. We note that the separate availability of cellular service and long distance service acts as an important check against unreasonable rates. McCaw now resells AT&T long distance service, which it acquires at volume-discounted rates under AT&T tariffs.[181] Following the proposed merger, AT&T/McCaw customers will receive a form of equal access under requirements that we

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47 U.S.C. § 202(a).

[179] The three-pronged test for a violation of Section 202(a) involves determining, first, whether the services are like one another, second, whether a price difference exists between the like services, and third, if a price difference does exist, whether it is justified and thus, not unreasonable. MCI Telecommunications Corp. v. FCC, 917 F.2d 30, 39 (D.C. Cir. 1990).

[180] Section 201(b) reads in part:

> All charges, practices, classifications, and regulations for and in connection with [interstate] communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful. . .

47 U.S.C. § 201(b).

[181] We note that McCaw's authorized international resale subsidiary, Continental Intercell, Inc., currently is classified as dominant in its provision of resold international switched voice service. See Continental Intercell, Inc., File No. I-T-C-91-046, 6 FCC Rcd 1958 (1991) (classifying Continental as dominant as a result of a 22% investment by British Telecom). The application to transfer control of Continental Intercell's international Section 214 authorization from McCaw to AT&T does not contain any request to modify the regulatory status of Continental Intercell. Should such a request be filed, we will at that time consider whether to modify the regulatory status of Continental Intercell.

impose[182] and/or under AT&T and McCaw's voluntary commitment; i.e., they will have the option of freely selecting any IXC to carry their interexchange calls. Thus, McCaw's current cellular service and AT&T's long distance service would not be inextricably tied together to deny AT&T/McCaw customers the choice of a carrier in either market. As an additional safeguard, AT&T and McCaw state their willingness to subject all transactions between their companies to our affiliate transaction rules.[183] Thus, to the extent that McCaw would continue to obtain its long distance service under bulk AT&T tariff offerings, such transactions would be posted in the Affiliate Transaction reports to demonstrate compliance with the tariffs.[184] In addition, the non-discrimination rules that we have established with respect to such bulk offerings would require that these services be made available to similarly-situated customers, including resellers, at comparable rates.[185]

78. Finally, as a condition of our approval of bundling local cellular with long-distance service, we will impose a price floor in order to preclude inefficient subsidization between the two services. The end-to-end rate shall not be less than the rate charged the general public and resellers for the air-time portion alone. Further, such rate must be the higher of (a) the price that either AT&T or McCaw paid for the other's service, or (b) the price either of them would have paid for the same service if it were unaffiliated with the other.

b. Cellular Network Equipment and Cellular Services

79. Various commenters' claim that AT&T could leverage its power in the local cellular network equipment market to produce anticompetitive results within local cellular markets. In addition, MCI specifically avers that the proposed merger would so significantly change the complexion of the cellular industry structure as to require a reexamination of the Commission's cellular CPE bundling policies.[186] These arguments assume, however, that AT&T enjoys dominance in these equipment markets. Regardless of whether we look at the domestic cellular equipment market, or the overall domestic and international mobile telecommunications

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[182] AT&T/McCaw will be subject to any equal access requirements that we adopt in the CMRS Notice rulemaking proceeding or in further orders of this Commission.

[183] AT&T and McCaw Opposition at 63.

[184] Id., Affidavit of Stephen B. Haggerty at 2.

[185] Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923 (1984).

[186] MCI Comments at 9.

equipment market, we are not persuaded that AT&T enjoys such dominance or market power. For example, AT&T and McCaw claim that their share of the worldwide cellular equipment market is 19%.[187] Certain commenters claim AT&T's share of the domestic cellular equipment market is 30% or greater.[188] Although it appears clear that AT&T is among the largest suppliers of cellular network equipment in the domestic market, there are other suppliers that have market shares of significant magnitude. In any event, this is a market with many players from essentially all of the industrialized countries of the world, most of them being large, well-financed enterprises such as Motorola, Siemens, Mitsubishi, Northern Telecom, and Hughes. Further, as we noted in our recent rulemaking proceeding dealing with cellular terminal equipment bundling, the cellular equipment market is extremely competitive, with between 17 and 25 manufacturers and innumerable distributors.[189] In that proceeding, we noted that no single manufacturer controlled more than 20% of the CPE market and that a continuous stream of new entrants were further intensifying competition.[190] We found, for those and other reasons, that CPE bundling with respect to local cellular services offered many significant benefits to consumers without posing any threat to competition in the local cellular service markets.[191] This finding, it should be noted, was predicated on our requirement that local cellular service and CPE equipment also be separately available, i.e., on an unbundled basis, at non-discriminatory rates.

80. We conclude that like the cellular CPE market, the network equipment market is competitive and exhibits no economic characteristics that could be used as the basis for denying customers the benefits of bundling non-regulated cellular CPE and

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[187] AT&T and McCaw Opposition, Affidavit of Lawrence A. Sullivan at 6.

[188] See ¶ 43, n. 118, supra. As already noted, our antitrust analysis of the cellular network equipment market, and the results of our analysis, would be the same regardless of which market share is attributed to AT&T. Similarly, our antitrust analyses of the interexchange and local cellular services markets, and the results of our analyses, would be the same regardless of which market share we adopt from among the ones presented by the parties and cited herein.

[189] Bundling of Cellular Customer Premises Equipment and Cellular Service, 7 FCC Rcd at 4028, 4029 ("Bundling Order").

[190] Id.

[191] Id. at 4030-31.

cellular local service.[192] Further, the option of unbundled local cellular transmission services ensures against otherwise possible anticompetitive conduct. We find no basis to conclude that the AT&T/McCaw merger will change the competitive nature of the equipment market or require that we revise our policies governing bundling of local cellular service and CPE terminal equipment.

3. Use of Information

Comments and Other Filings

81. BellSouth, NYNEX, PacTel, and SW Bell contend that we should prohibit AT&T from disclosing to McCaw any information, particularly the names and addresses of most of the BOCs' cellular customers, that AT&T obtains in its capacity either as the leading equipment supplier for many of the key cellular markets or as an IXC.[193] In addition, BellSouth argues that, until the BOCs are freed from MFJ restrictions, we should prohibit AT&T/McCaw from using confidential information concerning a competing cellular carrier's customer base for any purpose other than providing interexchange service.[194]

Opposition to Filings

82. AT&T and McCaw oppose restrictions on the use of information they obtain through serving their customers. They argue that because they have access to various cellular customers through multiple channels, such restrictions could lead to vexatious litigation.[195] In addition, AT&T and McCaw further argue that AT&T already has in place strict measures to prevent improper disclosures of confidential information, and that they will redouble their efforts after the merger to avoid even the

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[192] AT&T, of course, remains subject to our rule prohibiting the bundling of CPE and FCC-tariffed interstate services. 47 C.F.R. § 64.704(e); see also 47 U.S.C. § 503 (forfeitures in cases of rebates and offsets).

[193] BellSouth Petition at 51; NYNEX and PacTel Petition at 9-10; SW Bell Petition at 80-81. NYNEX, PacTel, and SW Bell also propose that the Commission forbid McCaw from sharing with AT&T any information of a proprietary nature that it may obtain from other interLATA carriers participating in AT&T and McCaw's proposed equal access plan. NYNEX and PacTel Petition at 10; SW Bell Petition at 80-81.

[194] BellSouth Petition at 52.

[195] AT&T and McCaw Opposition at 83.

appearance of impropriety.[196] AT&T and McCaw state that they will continue to honor customers' requests for confidentiality and will extend existing CPE and enhanced services Customer Proprietary Network Information ("CPNI") rules to cellular service.[197]

Discussion

83. CPNI is all information about customers' network services and customers' use of those services that a BOC possesses by virtue of its provision of network services. It includes billing information, usage data, calling patterns, traffic studies, and forwarded-to-numbers, but does not include credit information.[198] We have previously concluded, with regard to the marketing of both CPE and enhanced services,[199] that AT&T must, upon the customer's request: (1) make the customer's CPNI available to competing CPE suppliers; and (2) prohibit personnel who are involved in CPE and enhanced services marketing from gaining access to that customer's CPNI.[200] We found that prohibiting AT&T from using CPNI as a means of offering its business customers a single

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[196] Id. at 112.

[197] Id. at 84.

[198] Filing and Review of Open Network Architecture Plans, Memorandum Opinion and Order, 4 FCC Rcd 1215 (1988), recon., 5 FCC Rcd 3084 (1990).

[199] "Enhanced services" refers to "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a)(1993).

[200] See Amendment of Section 64.702 of the Commission's Rules and Regulations, Phase I, 104 FCC 2d 958, 1089 (1986) (Phase I Order), recon., 2 FCC 2d 3035 (1987) (Phase I Reconsideration Order), further recon., 3 FCC Rcd 1135 (1988) (Phase I Further Reconsideration Order), second further recon., 4 FCC Rcd 5927 (1989) (Phase I Second Further Reconsideration Order), Phase I Order and Phase I Reconsideration Order vacated sub nom., California v. FCC, 905 F. 2d 1217 (9th Cir. 1990); Phase II, 2 FCC Rcd 3072 (1987) (Phase II Order), recon., 3 FCC Rcd 1150 (1988) (Phase II Reconsideration Order), further recon., 4 FCC Rcd 5927 (1988) (Phase II Further Reconsideration Order), Phase II Order vacated sub nom., California v. FCC, 905 F. 2d 1217 (9th Cir. 1990); Furnishing of Customer Premises Equipment and Enhanced Services by AT&T, 102 FCC Rcd at 627, 694 (1985)(AT&T CPE Order).

point of contact for all of their network services and CPE needs would eliminate one of the benefits to AT&T of removing structural separation.[201] Similarly, in the instant proceeding, we reject the suggestion of three of the BOCs that we prohibit AT&T from disclosing its customers' CPNI to McCaw, because such a prohibition would undercut one of the benefits of the AT&T/McCaw combination: the ability of AT&T/McCaw to offer its customers the ability to engage in "one-stop shopping" for their telecommunications needs. Instead, we conclude that the AT&T/McCaw cellular services personnel must follow the same CPNI rules that currently apply to AT&T's marketing of CPE and enhanced services.[202] We acknowledge that AT&T/McCaw may obtain access legitimately to CPNI about other cellular carriers' customers through various channels, such as its role as a cellular CPE vendor. If a cellular carrier could prove that AT&T/McCaw misappropriated CPNI or misused such information entrusted to it, that carrier would have a remedy through the Commission complaint process or the courts.

4. Billing and Collection

Comments and Other Filings

84. SW Bell, NYNEX, and PacTel request that the AT&T/McCaw merger be conditioned on non-discriminatory billing and collection practices. SW Bell asks the Commission to require AT&T to offer on reasonable and nondiscriminatory terms and conditions the billing records and information an interexchange company would need to bill its customers and to provide service to the AT&T wireless affiliate.[203] Similarly, NYNEX and PacTel assert that AT&T/McCaw should be required, upon request, to provide all interLATA carriers with billing information and services equivalent to those provided to AT&T.[204] NYNEX and PacTel argue that AT&T should be required to offer unaffiliated wireless service providers a joint bill combining local and long distance wireless service on the same terms under which AT&T does for any AT&T-affiliated wireless provider.[205]

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201 AT&T CPE Order, 102 FCC 2d at 693.

202 See ¶¶ 109-113, infra, for a discussion of AT&T/McCaw's use of information that it acquires in its capacity as a supplier of cellular infrastructure equipment.

203 SW Bell Petition at 82.

204 NYNEX and PacTel Petition at 10.

205 Id.

Opposition to Filings

85. Noting that this is not the appropriate proceeding in which to regulate billing and collection, AT&T and McCaw assert that such services are competitive and conditions concerning them are unnecessary.[206] Further, AT&T and McCaw note that only two BOCs, Bell Atlantic and NYNEX, bill AT&T long distance services to their cellular customers, and that MCI and Sprint themselves bill their cellular customers.[207]

Discussion

86. We have previously determined that billing and collection services are competitive and have declined to exercise our Title I jurisdiction over them.[208] The petitioners have not persuaded us that the proposed merger will create any threat to the public interest sufficient to warrant imposition of billing and collection conditions on the merged entity. However, in the CMRS Notice proceeding, we have sought to comment on whether cellular carriers should be required to offer, pursuant to Title II and on reasonable and non-discriminatory terms and conditions, all information IXCs need to bill their customers, including ANI information, call detail reports, and billing name and address ("BNA").[209] AT&T/McCaw will be subject to any conditions that are adopted in that proceeding.

5. Resale of Local Cellular Services

Comments and Other Filings

87. NYNEX, PacTel, and SW Bell argue that the Commission should condition the proposed merger on abolishing any requirement that cellular carriers be obligated to provide resale capacity to AT&T/McCaw. NYNEX, PacTel, and SW Bell note that, under the MFJ's interLATA restrictions, the BOCs may resell cellular service only if that service provides equal access to interLATA services. NYNEX and SW Bell further note that while the AT&T/McCaw entity would not be affected by these restrictions, the MFJ effectively prevents the BOCs from reselling non-BOC cellular service, because it usually

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206 AT&T and McCaw Opposition at 85-87.

207 Id. at 86.

208 Detariffing of Billing and Collection Services, CC Docket No. 85-88, 102 FCC 2d 1150, recon., 1 FCC Rcd 445 (1986).

209 CMRS Notice, 9 FCC Rcd at __ [¶¶ 99-100].

does not offer equal access.[210] NYNEX and PacTel further argue that the Commission needs to modify its cellular resale policy to prevent a competitive anomaly whereby AT&T/McCaw could resell cellular service and, therefore, provide nationwide cellular coverage, while the BOCs could not.[211]

88. NCRA argues that AT&T and McCaw's public interest showing failed to discuss the impact of the proposed merger on the resale of cellular service.[212] NCRA further argues that the proposed merger should be approved only if, at a minimum: (1) there is an elimination of discriminatory terms in the sale of cellular service to cellular resellers; (2) service offerings are unbundled and offered on a reasonable basis; (3) cellular resellers are permitted to interconnect to the cellular system and to the LEC local loop; and (4) the resellers are able to purchase from the LECs portable NXX codes to meet retail customer needs.[213]

Opposition to Filings

89. AT&T and McCaw contend that the Commission should not consider cellular resale issues in this proceeding and that a rulemaking of general applicability is the more appropriate forum to address these issues.[214] AT&T and McCaw further contend that the BOCs can seek a narrowly-tailored waiver of the MFJ to permit resale of cellular service outside of their local exchange areas.[215] AT&T and McCaw note that McCaw has long been able to resell cellular service on a nationwide basis and thus argue that the

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[210] NYNEX and PacTel Petition at 11-12; SW Bell Petition at 83.

[211] NYNEX and PacTel Petition at 11.

[212] NCRA Petition at 9-12. NCRA urges the Commission to designate a formal hearing on this question and require that the applicants submit in advance all factual data together with legal and policy arguments that bear on this issue. Id. at 12.

[213] Id. at 16.

[214] AT&T/McCaw Opposition at 149. More specifically, AT&T and McCaw argue that any inequity in the BOCs' current condition can be resolved through a Commission rulemaking imposing equal access obligations on non-wireline cellular systems because this would permit the BOCs to resell cellular service outside of their local exchange areas without violating their MFJ equal access obligations. Id. at 152.

[215] Id.

merger changes nothing in this regard.[216] In addition, AT&T and McCaw argue that if the Commission restricts AT&T/McCaw's ability to resell cellular services, then AT&T/McCaw would be precluded from developing a viable competitive alternative to the BOCs' own MobileLink offerings.[217] With regard to the resale of AT&T/McCaw's own cellular service, AT&T and McCaw argue that the Commission has already rejected NCRA's claims that the cellular industry is not competitive and that cellular pricing practices preclude resale.[218]

Discussion

90. Once again, the BOCs propose changes to our rules as a way of fostering regulatory parity between AT&T/McCaw and them. In this instance, the restrictions prohibiting the BOCs from reselling non-BOC cellular services outside their respective local service areas have been established by the MFJ court, not this Commission. The BOCs can, if they choose, pursue their arguments to change these restrictions before the MFJ court. If the BOCs choose instead to argue that we should change our policy on cellular resale issues, they must do so in a rulemaking of general applicability, that provides a wider range of parties an opportunity to comment.[219] In any event, regardless of any distortion in the marketplace, the conditions we impose herein to protect consumers should also redound to the advantage of AT&T/McCaw's competitors.

91. NCRA, a potential resale customer of AT&T/McCaw, also seeks relief beyond the scope of this proceeding. NCRA's arguments that we grant cellular resellers the ability both to interconnect to the cellular system and the LEC local loop as well

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[216] Id. at 151.

[217] Id. at 152. Mobilelink is the trade name of a consortium of "B-side" or wireline cellular licensees that provides its customers with various benefits, including simplified calling arrangements, standardized dialing codes in major metropolitan areas, 24-hour customer service, and service and repair centers.

[218] Id. at 153.

[219] We recently clarified our policy on the resale of cellular service in such a rulemaking. See Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, 7 FCC Rcd 4006 (1992); see also Resale and Shared Use of Common Carrier Services and Facilities, 60 FCC 2d 261 (1976), modified on other grounds, 62 FCC 2d 588 (1977), aff'd sub nom. AT&T v. FCC, 572 F.2d 17 (2d Cir. 1978), cert. denied, 439 U.S. 875 (1978); Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, 83 FCC 2d 167, 193 (1980).

as to purchase NXX codes from the LEC are more appropriately addressed in rulemaking proceedings.[220]

6. Manufacturing Restrictions

92. SW Bell, Bell Atlantic, NYNEX, PacTel, BellSouth, and Ameritech propose four types of manufacturing restrictions. They are:

1. nondiscrimination, notice, and reporting requirements relating to new features and functions, installation, and maintenance;[221]

2. a prohibition on AT&T's development and manufacture of proprietary equipment for McCaw;[222]

3. mandatory licensing of AT&T wireless patents;[223] and

4. a ban on disclosure to AT&T wireless affiliates of information received from non-affiliated AT&T equipment customers.[224]

93. We address the specific claims relating to each proposed restriction seriatim.

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[220] We note that NCRA has raised analogous arguments in the CMRS rulemaking proceeding, and the Commission will address them more fully in that context. See CMRS Notice, 9 FCC Rcd at __ [¶¶ 121-123, 137-38 and n. 213].

We also reject NCRA's suggestion that we designate a formal hearing on the impact of the proposed merger on the resale of cellular service. As we discuss below, we are not obligated to conduct a formal hearing in this proceeding unless a substantial and material question of fact is presented or we are unable to make the public interest finding required under the Act. See ¶ 170, infra.

[221] See SW Bell Petition at 80; Bell Atlantic Petition at 8; NYNEX and PacTel Petition at 12-13; BellSouth Petition at 51; Ameritech Comments at 15.

[222] See SW Bell Petition at 80; Bell Atlantic Petition at 8; NYNEX and PacTel Petition at 13; BellSouth Petition at 51; Ameritech Comments at 15.

[223] See BellSouth Petition at 51-52.

[224] See SW Bell Petition at 80-81; Bell Atlantic Petition at 8; NYNEX and PacTel Petition at 9-10; BellSouth Petition at 51.

a. Nondiscrimination, Notice, and Reporting Requirements

Comments and Other Filings

94. NYNEX and PacTel contend that the AT&T/McCaw merger could lead to delayed or denied servicing of equipment, differential pricing of hardware and software, and delayed availability or installation of new hardware.[225] Therefore, NYNEX and PacTel urge the Commission to condition its approval of the merger on requiring AT&T/McCaw to provide any wireless hardware or software to all other wireless carriers on terms and conditions no less favorable than those available to McCaw.[226]

95. SW Bell, BellSouth, and Ameritech agree generally and request various specific conditions. SW Bell asserts that such non-discriminatory obligations should extend to the ordering, provisioning, and installing of new network equipment, and also should cover continuing maintenance by AT&T/McCaw as well as disclosure and availability of equipment and software upgrades.[227] BellSouth requests that the merger be conditioned on requiring AT&T/McCaw to make available to all current or prospective purchasers any new or updated wireless network equipment feature, functionality, or technology developed by AT&T/McCaw, including technical and functional specifications, interface requirements, and similar information, no later than the time they are made available to McCaw.[228] Ameritech seeks the imposition of an affirmative duty to deal with McCaw's competitors on equipment and software matters, and network/software disclosure rules and reporting requirements patterned after those in Computer III.[229]

Opposition to Filings

96. AT&T and McCaw oppose the proposed nondiscrimination requirements. They argue that the equal treatment and reporting requirements are pointless and that there is no precedent for the Commission to institute burdensome reporting requirements concerning such matters as installation and maintenance times. AT&T and McCaw assert that the BOCs could detect and report discrimination because they have years of experience in dealing with AT&T and own a large number of cellular systems which do not

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225 NYNEX and PacTel Petition at 13.

226 Id.

227 SW Bell Petition at 79.

228 BellSouth Petition at 51.

229 Ameritech Comments at 15-16.

compete with McCaw.[230] AT&T and McCaw further contend that any attempt to analogize to Computer III is totally misguided because installation and maintenance are unregulated manufacturing activities that are not even "ancillary to Title II restrictions".[231]

Discussion

97. We believe that market forces will largely eliminate AT&T's ability to discriminate unreasonably. AT&T/McCaw cellular affiliates by themselves are not a large enough consumer of AT&T products to make it profitable for AT&T/McCaw to provide poor products or service to other customers, especially customers with the market power and sophistication of the BOCs, who have the choice of buying from other cellular equipment suppliers.[232] Moreover, if unhappy with AT&T/McCaw's cellular products or servicing of those products, the BOCs also could shift their purchases of wireline network equipment to other suppliers. These threats to AT&T/McCaw's equipment sales create a powerful incentive for AT&T/McCaw to offer all of its cellular equipment customers, not just its cellular affiliates, quality products and services. As we have previously stated, AT&T's sales could otherwise decline as the fact of discrimination became known.[233]

98. Further, we are unpersuaded by the BOCs' arguments about "lock-in", which occurs when a cellular service provider is unable to switch to the equipment of a different manufacturer for technical or financial reasons. As an initial matter, we find the argument unpersuasive because, at the same time the BOCs complain of the technical and financial impediments to switching equipment suppliers in their systems, they allege that AT&T/McCaw will replace McCaw's Ericsson equipment with AT&T equipment.[234] If the difficulties of switching are so great, we doubt that AT&T/McCaw will be able to rush to switch equipment. On the other hand, if AT&T/McCaw could switch so readily, we find it difficult to believe that the BOCs would have much greater difficulty in switching their

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[230] AT&T and McCaw Opposition at 110-111.

[231] Id. at 111.

[232] According to AT&T and McCaw, McCaw's purchases represent about 13% of the domestic market for cellular equipment, while AT&T's domestic market share as a supplier is approximately 30%. Id. at 89, 96. SW Bell estimates AT&T's market share at approximately 40%. SW Bell Petition at 79.

[233] See ¶ 52, supra.

[234] AT&T and McCaw state that Ericsson is currently McCaw's primary equipment supplier. AT&T and McCaw Opposition at 96.

systems if AT&T/McCaw product or product servicing quality dropped. More importantly, the advent of the recently-adopted IS-41 standard of the Telecommunications Industry Association, which facilitates the use of different suppliers' equipment within the same cellular system, should reduce the cost of switching cellular equipment providers and, consequently, any potential "lock-in" effect. Finally, affiants on both sides of the debate agree that the merger of AT&T and McCaw will not enhance AT&T's ability to discriminate or exploit "lock-in".[235]

99. Despite these long-term incentives on AT&T/McCaw and the discipline created by the competitive marketplace, we are aware that the merger of AT&T and McCaw will create some incentive for AT&T to favor McCaw over other cellular equipment customers in the short term during which these market-based protections will likely be absent. Therefore, as we have previously stated, we will require that AT&T/McCaw not unreasonably discriminate in its provision of products or services under existing contracts.[236] By imposing this obligation, we create a duty that, if breached by AT&T, would expose AT&T to liability for administrative sanctions on the motion of aggrieved customers or the Commission's own motion.

100. We will not impose the notice and reporting requirements sought by the BOCs because we believe these requirements to be unnecessary and unduly burdensome given the powerful market incentives on AT&T/McCaw not to discriminate. We believe that market forces combined with the threat of litigation will adequately deter AT&T/McCaw from discriminating in favor of its cellular affiliate, even in the subtle ways described by SW Bell.[237]

b. Proprietary Product Development

101. Ancillary to their requests for protection from discrimination, several of the BOCs urge us to prohibit AT&T from developing proprietary products for McCaw as a condition of our approval of the merger. We treat a ban on the development of proprietary products as an issue separate from discrimination.

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[235] AT&T and McCaw Opposition, Affidavit of Lawrence A. Sullivan at 13; SW Bell Petition, Affidavit of Steven C. Salop and Franklin Fisher at 47.

[236] See ¶ 56, supra.

[237] See SW Bell Reply at 62-63.

Comments and Other Filings

102. BellSouth urges that AT&T/McCaw should be required to provide "any new or updated wireless network equipment feature, functionality, or technology developed by AT&T/McCaw, no later than the time such feature, functionality, or technology is made available to McCaw."[238] NYNEX and PacTel request that AT&T be required to provide any equipment it supplies to McCaw to all other customers on terms no less favorable than those offered to McCaw.[239] Bell Atlantic and SW Bell suggest that AT&T/McCaw should be required to provide to all customers all equipment and software, including any "special features" it provides to McCaw.[240] These requirements, if fully implemented, would not only prohibit discrimination, but would also prohibit AT&T from contracting with McCaw to develop proprietary equipment because anything AT&T supplied to McCaw would have to be made generally available.

Opposition to Filings

103. AT&T and McCaw object to a ban on the development of proprietary equipment for McCaw because AT&T/McCaw would then be unable to provide to McCaw a service, the development of proprietary products, that it provides to the BOCs and any other customer who wishes to so contract with AT&T/McCaw. This, claim AT&T and McCaw, amounts to preferential treatment for the BOCs to the detriment of McCaw that is both unfair and inimical to the public interest.[241]

Discussion

104. We have declined to order the strict nondiscrimination requirements sought by the BOCs. We reasoned that market forces will adequately restrict AT&T/McCaw from unreasonably discriminating in favor of McCaw in making those products and services available because AT&T's sales will decrease as the fact of discrimination becomes known.[242] The ability of AT&T to develop proprietary products for McCaw may impede the market's ability to detect discrimination in favor of McCaw, however, because the fact that McCaw is receiving a product that other customers are not receiving would not signal discrimination with

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[238] BellSouth Petition at 51.

[239] NYNEX and PacTel Petition at 13.

[240] Bell Atlantic Petition at 8; SW Bell Petition at 80; SW Bell Reply at 78-79.

[241] AT&T and McCaw Opposition at 113-114.

[242] See ¶¶ 56, 97, supra.

regard to proprietary product development, which by its very nature limits the availability of the product to the customer who pays to have it developed. On the other hand, to prohibit AT&T/McCaw from developing proprietary equipment for McCaw would decrease competition among suppliers of proprietary products and, potentially, cellular service providers and would therefore not be in the public interest.

105. We believe the public benefits of increased competition to be substantial. Therefore, we will prohibit AT&T/McCaw from offering proprietary product development services and the associated products to its cellular affiliate on more favorable terms than those offered to other customers who contract with AT&T/McCaw for proprietary development services for other products. We will also require AT&T/McCaw and its cellular affiliate to enter written contracts for the development of proprietary products before AT&T/McCaw begins developing such products. Nothing in the record convinces us that we should go further to prohibit AT&T/McCaw from entering a written contract under which AT&T/McCaw is to develop a product that, by virtue of the contract, would be exclusive to its cellular affiliate. We note that AT&T regularly enters such contracts with its cellular equipment customers.

c. Patent Licensing

Comments and Other Filings

106. BellSouth asks that the Commission require AT&T/McCaw to license on a nonexclusive, nondiscriminatory basis all of its wireless communications patents.[243] It appears that BellSouth is concerned that AT&T/McCaw could restrict the development of technologies helpful to competitors of AT&T/McCaw and could limit the availability of certain intellectual property to McCaw exclusively or, at least, make intellectual property available to McCaw on more favorable terms or at more advantageous times than to competitors.[244]

Opposition to Filings

107. AT&T and McCaw respond that such a requirement would be anticompetitive, improper, unprecedented, and would destroy AT&T's incentive to innovate.[245] AT&T and McCaw further respond that the only time the Commission or the courts have required

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[243] BellSouth Petition at 51-52.

[244] Id. at 42.

[245] AT&T and McCaw Opposition at 115.

mandatory patent licensing was in instances, unlike the current competitive marketplace, where the patented technology was developed using funds from regulated monopoly revenues.[246] Finally, AT&T and McCaw state that the courts have held that mandatory licensing requirements are impermissible where no regulated monopoly exists and the patent-holder is engaged in only competitive markets.[247]

Discussion

108. We do not believe requiring mandatory licensing of all of AT&T/McCaw's wireless communications patents is warranted. The cellular equipment marketplace is obviously more competitive today than it was in 1981 when we declined to impose technology sharing requirements on wireline cellular licensees because, inter alia, of the approaching entrance of potential new competitors into the cellular equipment market.[248] Despite the lack of mandatory technology sharing by AT&T, these competitors have grown and flourished in the interim, giving cellular equipment consumers a broad array of competitive products from which to choose. We do not believe that the instant merger will reverse this result or reduce the availability of technologically competitive products. Additionally, unlike the situation with wireline cellular licensees in 1981, nothing in the record suggests that any of the patents in question were developed using revenues from regulated monopoly activities.[249] Thus, the historical and legal justification for requiring AT&T/McCaw to share its technology is absent.

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[246] Id. at 116-117.

[247] Id. at 116; see United States v. AT&T, 552 F. Supp. at 176-177.

[248] See Cellular Communications Systems, 86 FCC 2d 469, 498-99 (1981) ("Cellular Radio Rulemaking"), recon. granted in part, denied in part, 89 FCC 2d 58 (1982) ("Cellular Radio Reconsideration Order").

[249] See Cellular Radio Rulemaking, 86 FCC 2d at 498-99. Because some of the patented technology was developed using funds from regulated monopoly revenues, the Commission agreed to study the issue further in its inquiry into license contract agreements. Id.; see License Contract Agreements, Notice of Inquiry, 84 FCC 2d 259 (1981). This inquiry was terminated without action by the Commission after the MFJ wrought significant changes in the structure of the Bell System. See License Contract Agreements, 55 RR 2d 128 (1983).

d. Disclosure of Proprietary Customer Information

109. The BOCs request that we impose measures to insure that proprietary information is not shared among the wireline interexchange service, wireless service, and manufacturing divisions and affiliates of AT&T. The sharing of information among the wireline interexchange and wireless service divisions and affiliates of AT&T is addressed elsewhere in this Order.[250] Therefore, we limit ourselves here to considering the sharing of information among AT&T's manufacturing and wireless service divisions and subsidiaries.

Comments and Other Filings

110. SW Bell suggests that all AT&T/McCaw personnel involved in marketing or providing wireless services should be denied access to information about competing wireless service providers gained by personnel involved in providing equipment to those competitors. The restricted information should include, but not be limited to, service plans, system characteristics, lists of customers, and usage patterns.[251] Bell Atlantic urges us to adopt the restrictions suggested by SW Bell.[252] NYNEX and PacTel argue that without such restrictions on the dissemination of information among AT&T's divisions and affiliates, McCaw would acquire much sensitive proprietary information about its competitors, especially in the larger, more highly competitive markets.[253] BellSouth would restrict access to information about the purchase of wireless network equipment including number, size, configuration, technical specifications, location, and delivery schedules; the addition of features or functionalities; the search for additional features or functionalities; and the search for new or updated technology and applications.[254]

Opposition to Filings

111. AT&T and McCaw respond that AT&T already has sufficient safeguards in place to protect the proprietary information it receives from its wireless equipment customers. These safeguards include: the use of separate account sales teams; enforcement of a stringent employee code of conduct that limits the

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250 See ¶¶ 81-83, supra.

251 SW Bell Petition at 80-81.

252 Bell Atlantic Petition at 8.

253 NYNEX and PacTel Petition at 9-10.

254 BellSouth Petition at 51.

dissemination of customers' proprietary information to only those AT&T employees with a "need to know" and provides for the termination of any employee who violates the prohibition; and the inclusion in its equipment sales contracts of provisions requiring AT&T to shield confidential information from disclosure to the customers' competitors. Finally, AT&T and McCaw argue that the restrictions sought by BellSouth are overly broad because they would prohibit the dissemination of information that is in the public domain as well as proprietary and confidential information.[255]

Discussion

112. It is instructive that no BOC suggests that the safeguards AT&T already employs have failed to protect the proprietary information the BOCs have supplied to AT&T, and that the BOCs' comments focus on the kinds of information they seek to protect rather than additional steps AT&T could take to protect its cellular equipment customers' proprietary information from unauthorized disclosure. Further, there already exist strong market and legal incentives for AT&T, and any other equipment supplier, to safeguard its customers' proprietary and confidential information. No equipment supplier could long attract customers if it failed to protect its customers' proprietary information properly. The threat of litigation in the courts and the potential for administrative proceedings and sanctions are added incentives on AT&T as an equipment supplier to protect its equipment customers' proprietary information. Therefore, we decline to impose the information restrictions requested by the BOCs.

113. To the extent the BOCs desire and can identify additional safeguards to protect information they give AT&T in its capacity as an equipment supplier, or can identify particular information they desire to safeguard, they are free to insert such requirements into their contracts with AT&T. In negotiating these contracts, AT&T is generally under a duty of good faith and fair dealing, which we believe will, along with market incentives, induce AT&T to accept reasonable, additional safeguards.

7. Affiliate Transactions / Structural Separation

a. Affiliate Transactions

Comments and Other Filings

114. SW Bell argues that the Commission should extend to AT&T/McCaw's wireless operations, as a condition to the approval of the merger, the Part 64 and Part 32 affiliate transaction

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[255] AT&T and McCaw Opposition at 111-112.

safeguards applicable to the BOCs.[256] SW Bell further argues that such safeguards would ensure that any transactions between AT&T and any AT&T affiliate are at arm's length, in keeping with the proposed structural separation.[257]

Opposition to Filings

115. AT&T and McCaw contend that the Commission's joint cost and affiliate transaction rules currently require that AT&T record goods and services transferred between regulated and unregulated businesses. AT&T and McCaw state that while these rules might not apply by their terms to transactions between AT&T/McCaw and AT&T because they are both regulated, they will subject all transactions between AT&T and McCaw to these rules for as long as the affiliate transaction rules are applicable to AT&T.[258]

Discussion

116. SW Bell's argument that we should require AT&T/McCaw to follow Part 64 and Part 32 affiliate transaction rules assumes structural separation between AT&T and McCaw's wireless operations, which we decline to order below.[259] Nevertheless, as a carrier subject to our Joint Cost rules,[260] AT&T must adhere to Section 32.27,[261] which sets forth the terms under

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256 SW Bell Petition at 82-83.

257 Id. at 82.

258 AT&T and McCaw Opposition at 63.

259 See ¶¶ 123-125, infra.

260 In the Joint Cost proceeding, the Commission adopted a comprehensive set of rules to assure that a carrier's regulated operations do not cross-subsidize its nonregulated activities. These rules govern how carriers allocate their costs between regulated and nonregulated activities and how they account for transactions with their affiliated companies. See Separation of Costs of Regulate Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298, 1300 (1987) (Joint Cost Order), modified on recon., 2 FCC Rcd 6383 (1987), modified on further recon., 3 FCC Rcd 6701 (1988), aff'd sub nom. Southwestern Bell Corp. v. FCC, 896 F.2d 1378 (D.C. Cir. 1990).

261 The rules distinguish between transactions involving the transfer of assets and the provision of services. The transfer of assets between affiliates must be recorded at the prevailing price held out to the general public. If no prevailing price is available, asset transfers from the affiliate to the carrier must

which carriers may record affiliate transactions in their books of account. In addition, the Joint Cost rules also require that AT&T and other subject carriers file cost allocation manuals (CAMs) which set forth the procedures the carriers use to comply with the Commission's affiliate transaction rules and other cost allocation standards.[262] Therefore, we require AT&T and McCaw to subject all transactions between them to these rules as a condition of our approval of the merger. In this regard, McCaw's wireless services shall be treated as non-regulated activities for federal accounting purposes.[263] In addition, under our rules, AT&T is required to keep current its Cost Allocation Manual (CAM) on file with this Commission.[264] In order to facilitate prompt review of CAM compliance and safeguard against improper cross-subsidies between service offerings, we hereby require that AT&T file any necessary

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be recorded at the lower of net book cost or fair market value. Asset transfers to the affiliate from the carrier must be recorded at the higher of net book cost or fair market value. The provision of services must be recorded at a tariffed rate or prevailing price if one exists. Absent a prevailing price, the cost of the service must be allocated pursuant to the cost allocation standards of Section 64.901 of the rules.

The Commission has recently proposed amendments to the rules. See Amendment of Parts 32 and 64 of the Commission's Rules to Account for Transactions between Carriers and Their Nonregulated Activities, Notice of Proposed Rulemaking, 8 FCC Rcd 8071 (1993).

[262] The CAMs must contain a chart showing all of the carrier's affiliates and a description of all affiliate transactions. The description of each affiliate transaction must include its nature, terms, and frequency of occurrence between the regulated company and its affiliates. Although our rules require that the carriers update their CAMs quarterly, in this Order we require AT&T to file its necessary CAM amendments upon consummation of the merger. After the proposed merger is consummated, AT&T must also add McCaw to its chart of affiliates and include a description of all transactions that will occur between the two companies.

[263] We note that states may require AT&T/McCaw accounting records for their regulatory oversight, to the extent that the states have jurisdiction over AT&T/McCaw activities.

[264] See Joint Cost Order, 2 FCC Rcd at 1328; see also, Cost Allocation Manual for the Accounting Separation of the Regulated and Nonregulated Costs of AT&T Communications, 3 FCC Rcd 143 (1988). CAMs describe specifically how carriers group costs into homogenous cost pools and how they allocate costs into those pools to nonregulated activities. CAMs are public documents approved by Commission staff after opportunity for public comment.

CAM amendments[265] promptly upon the consummation of the proposed merger between AT&T and the McCaw cellular companies.[266]

b. Separate Corporate Subsidiary

Comments and Other Filings.

117. BellSouth, SW Bell, NYNEX, PacTel, and Ameritech urge the Commission, if it ultimately approves the proposed merger, to adopt a requirement that AT&T/McCaw's cellular operations be structurally separated from its interexchange and manufacturing operations in much the same way that Part 22 of the Commission's rules required the BOCs to separate their cellular operations from the provision of local telephone service.[267] BellSouth argues that it is necessary to reimpose the separate subsidiary requirement that applied to AT&T's cellular activity before divestiture to limit AT&T/McCaw's power to dominate its competition.[268] SW Bell

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[265] The Commission's rules require that CAMs describe the carriers' nonregulated activities, list the activities for which the carriers account as incidental to regulated services, and provide information on the carriers' affiliate transaction, employee time reporting procedures and cost apportionment methods. Each CAM must show, for each Part 32 account containing costs incurred in providing regulated services, the cost pools to which amounts in the account are assigned, the procedures used to place costs into each cost pool, and the basis on which each cost pool is apportioned between regulated and nonregulated activities. Cost pools are comprised of logical, homogenous groupings of costs that maximize the extent to which cost-causative allocation factors can be used to divide the costs between regulated and nonregulated activities.

[266] We normally require AT&T to file CAM changes involving either its cost categories and allocation mechanisms or its allocation of employee time, including nonproductive time, 60 days before such changes are implemented. See American Telephone & Telegraph Company's Permanent Cost Allocation Manual for the Separation of Regulated and Nonregulated Costs, 3 FCC Rcd 1786, 1798 (Com.Car.Bur. 1988). We find that it is in the public interest here, however, to waive this 60-day requirement and permit AT&T to file CAM amendments that reflect changes in either cost categories and allocation mechanisms or employee time, upon consummation of the merger rather than 60 days prior to implementation of such changes.

[267] BellSouth Petition at 49; SW Bell Petition at 71-72; NYNEX and PacTel Petition at 8; Ameritech Comments at 16.

[268] BellSouth Petition at 50.

argues that structural separation for AT&T/McCaw is necessary because the entity would be fully vertically integrated in wireless long distance services, wireless equipment and software, and local wireless service.[269] NYNEX and PacTel contend that regulatory parity dictates that the structural separation requirement should apply to AT&T/McCaw for as long as such a requirement applies to the BOCs, even though NYNEX and PacTel do not believe that structural separation for the BOCs is warranted in light of current market conditions.[270]

118. BellSouth further argues that any interstate common carrier service or commercial mobile service provided by AT&T/McCaw should be subject to full Title II regulation, and not be exempted from portions of Title II (as is most cellular service), unless (1) its wireless operations are separated from its other operations, and (2) the wireless subsidiary is subjected to a ban on providing interexchange service as long as its BOC competitors remain subject to the MFJ.[271] In addition, NYNEX and PacTel contend that AT&T/McCaw should be prohibited from the joint marketing of interLATA and cellular service to ensure regulatory parity with the BOCs.[272]

119. Several of the BOCs urge us to condition our approval of the instant merger on requiring the structural separation of manufacturing and cellular businesses. BellSouth argues that AT&T/McCaw should be subject to the Part 22 requirements, as are the BOCs, in order to bring AT&T's cellular operations back under Commission regulation.[273] According to BellSouth, structural separation of AT&T/McCaw's manufacturing and cellular operations would prevent AT&T from misusing its

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[269] SW Bell Petition at 73.

[270] NYNEX and PacTel Petition at 8.

[271] BellSouth Petition at 50.

[272] NYNEX and PacTel Petition at 9. NYNEX and PacTel would permit AT&T/McCaw to use the names and other data concerning its cellular customers to market interLATA service only if it provides the same data to unaffiliated carriers, on equivalent terms and conditions as the data are provided to AT&T/McCaw's interLATA operation. Id.

[273] BellSouth points out that in 1981 the Commission imposed structural separation requirements on AT&T, but that these requirements ended when the cellular subsidiary was dissolved and its licenses transferred to the BOCs upon divestiture. BellSouth Petition at 49-50 (citing Cellular Radio Rulemaking, 86 FCC 2d at 493, 495).

relationship with McCaw to favor McCaw over McCaw's competitors.[274] SW Bell agrees that the full panoply of Part 22 structural separation requirements should be imposed because the merged AT&T/McCaw will include wireless equipment manufacturing, local wireless service, and long distance wireless service.[275] NYNEX and PacTel state that current market conditions indicate that neither AT&T/McCaw nor the BOCs should be subject to the structural separations requirements, but regulatory parity dictates that AT&T/McCaw should bear the same restrictions as the BOCs.[276]

Opposition to Filings

120. AT&T and McCaw contend that imposition of the full range of Part 22 structural separation requirements would destroy substantial benefits and legitimate efficiencies that the merger would achieve.[277] They argue that whether the structural separation requirements should apply in the future to the BOCs is the subject of another pending proceeding, but in no case should the requirements be extended to AT&T/McCaw. They further argue that vertical integration generally is considered benign and that structural separation is appropriate only where a wireline carrier controls bottleneck monopoly facilities with an opportunity to cross-subsidize unregulated operations.[278] AT&T and McCaw contend that the interexchange and cellular equipment markets are both competitive and that AT&T lacks an ability to discriminate against other cellular providers or their customers.[279]

121. AT&T and McCaw also contend that NYNEX and PacTel's proposed ban on joint marketing of cellular and long-distance services is unwarranted and would destroy the reasons for the merger. They maintain that joint marketing conditions are justifiable only where there is a risk of misallocation of joint marketing expenses to regulated monopoly businesses. Because the long-distance and wireless markets are both competitive, AT&T and McCaw reason, such a risk is precluded in the instant case. Moreover, AT&T argues, a joint marketing condition would neutralize AT&T/McCaw's ability to provide "one-stop shopping" for its customers through AT&T's phone stores and direct sales forces for

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274 Id. at 51.

275 SW Bell Petition at 71-73.

276 NYNEX and PacTel Petition at 8.

277 AT&T and McCaw Opposition at 73.

278 Id. at 70.

279 Id. at 72.

cellular terminal equipment ("CPE"), which AT&T and McCaw claim is one of the central reasons for the proposed merger.[280]

122. Vanguard also opposes the BOCs' request that the Commission impose a structural separation requirement on AT&T/McCaw's cellular operations, and it argues that such a requirement is unjustified and ill-advised, because both AT&T and McCaw provide services in competitive markets and neither controls essential bottleneck monopoly facilities.[281]

Discussion

123. The BOCs' arguments that the Commission should impose Part 22 structural separation requirements on AT&T/McCaw's cellular operations are premised, in large part, on the concept of regulatory parity. The BOCs reason that if they are subject to restrictions that prohibit them from offering interLATA service and require that their cellular operations be separated from their provision of local telephone service, then their competitor, AT&T/McCaw, should face the same restrictions. As we already have stated, we will not consider arguments in this proceeding that are better addressed in other Commission proceedings, or other legal fora, including the MFJ court and the Congress.

124. After removing regulatory parity considerations from our analysis, and in view of the condition on affiliate transactions that we are imposing,[282] we conclude that any concerns of possible cross-subsidization or misallocation of costs between regulated and unregulated businesses conducted by AT&T/McCaw are not sufficient to warrant either structural separation under Part 22 or a prohibition of joint marketing. We agree with AT&T and McCaw that to impose such requirements on the AT&T/McCaw entity would frustrate a customer's ability to meet all of its telecommunications needs through integrated service offerings from a single vendor, one of the notable benefits of the merger to the consumer. For these reasons, we decline to require structural separation or to prohibit joint marketing of cellular and long distance services.[283]

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[280] Id. at 80.

[281] Vanguard Comments at 26-29.

[282] See ¶ 116, supra.

[283] Unlike the ten-year separate corporate structure requirement in the DOJ, AT&T, and McCaw Stipulation, we are not imposing a separate subsidiary requirement for any period. AT&T/McCaw, of course, would need our prior approval pursuant to Section 310 of the Act before the licenses held by affiliated companies may be assigned, even within the AT&T family of

125. We also decline to impose the Part 22 structural separation rules between AT&T/McCaw's manufacturing and cellular operations. The conditions warranting structural separation are not present here. AT&T is neither a monopoly wireline carrier nor a monopoly supplier of cellular service equipment, and the cellular equipment and equipment maintenance markets are competitive. We previously have declined to apply the structural separations rules in situations where competition rendered their application unnecessary.[284]

8. Mobile Satellite Services

Comments and Other Filings

126. Comsat requests that the Commission require AT&T/McCaw and American Mobile Satellite Corporation (AMSC) to implement five safeguards to insure that the mobile satellite services market remains competitive following the merger of AT&T and McCaw. These safeguards are: 1) barring AT&T/McCaw and AMSC from entering exclusive arrangements to provide service; 2) prohibiting AT&T/McCaw from discriminating in favor of AMSC in distributing mobile satellite services traffic and requiring AMSC to offer equal access; 3) requiring AT&T/McCaw and AMSC to agree not to pursue any right to handle or interchange traffic to the exclusion of any other carrier; 4) requiring AT&T/McCaw and AMSC to implement structural and nonstructural safeguards to protect proprietary information received from any other carrier; and 5) requiring AMSC to develop cost allocation procedures, subject to Commission approval, to prevent cross-subsidization of competitive services.[285]

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companies. While such transaction might be exempt from the HSR pre-merger review process, we may treat any such transaction as major and subject to public comment, not merely as a pro forma assignment of licenses, in light of competitive conditions prevailing at that time.

[284] CPE Order, 57 RR 2d at 1002. We declined to apply the structural separation rules to the BOCs' cellular subsidiaries with regard to selling CPE. We reasoned that competition from other providers of cellular CPE was sufficient to eliminate the threat of anticompetitive harm that the structural separation rules were intended to address. We have also declined to impose the Part 22 restrictions where the threat to competition from these conditions was outweighed by other factors such as the cost of compliance and the loss of economies of scale. Cellular Radio Reconsideration Order, 89 FCC 2d at 78.

[285] Comsat Comments at 6.

127. In support of its request, Comsat states that AT&T/McCaw could gain control of AMSC following an upcoming public offering of AMSC stock either through direct purchases of AMSC stock or through the dilution of other large shareholders interests. According to Comsat, McCaw currently holds a 31.5% interest in AMSC and that McCaw recently attempted to take over AMSC.[286]

128. Comsat worries that when the market presence of AT&T/McCaw is combined with AMSC's exclusive right to provide certain mobile satellite services in the United States, the playing field in the mobile satellite services market, especially maritime mobile satellite services, will tilt in favor of AT&T/McCaw, which will be in a position to engage in a variety of anticompetitive behaviors.[287] Comsat alleges that AT&T has previously discriminated against Comsat by routing calls through its own facilities rather than through Comsat facilities, and that AT&T will after the merger discriminate by routing calls through its own facilities and AMSC's facilities to the exclusion of other maritime mobile satellite service providers.

Opposition to Filings

129. AT&T and McCaw dispute that they will control AMSC following the merger. Further, they state, when and if AT&T/McCaw seeks to gain control of AMSC, the Commission will, pursuant to its rules, review that transaction and can address any concerns that Comsat may have about the transfer of control in that proceeding.[288] AT&T and McCaw also state that, unlike other current AMSC shareholders, McCaw has not committed to purchase any of the stock to be offered in the upcoming public offering.[289] Finally, AT&T and McCaw argue that the Commission has already reviewed AMSC's activities and found AMSC to be a non-dominant participant in a competitive market.[290]

130. AMSC comments that McCaw does not control AMSC, has no directors on AMSC's board, that the upcoming public offering is expected to result in a dilution of McCaw's interest, and that McCaw's previous takeover attempt was defeated by a majority of the shareholders. AMSC also asserts that Comsat has failed to offer

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[286] Comsat Comments at 2.

[287] Id. at 1-4; Comsat Reply Comments at 3-5.

[288] AT&T and McCaw Opposition at 163; see 47 C.F.R. § 25.118.

[289] AT&T and McCaw Opposition at 163.

[290] Id. at 163-164; see Applications of Global Land Satellite, 2 FCC Rcd 485, 490 (1987) ("Land Mobile Satellites").

any evidence that AMSC will be able to eliminate competition in maritime communications or that any of the feared anticompetitive activities will occur.[291]

Discussion

131. We decline to impose the restrictions suggested by Comsat for three reasons. First, we are not convinced that the merger of AT&T and McCaw poses a threat to competition in maritime mobile satellite services. Second, we are not convinced that AT&T will obtain control of AMSC by virtue of the merger of AT&T and McCaw. Third, it would be inappropriate to impose restrictions on AMSC in the context of a merger to which it is not a party.

132. Comsat provides no persuasive argument that competition will be lessened in maritime mobile satellite services by virtue of the instant merger. Comsat's arguments are based on the mistaken premise that AMSC will be able to leverage its market power in those services for which it is the exclusive licensee to engage in predatory pricing and other anticompetitive behaviors in maritime mobile satellite services.[292] We have previously found that AMSC is nondominant (i.e. without market power) and faces competition from a variety of substitute services.[293] We are not prepared, on the basis of the record before us, to change that conclusion.

133. Likewise, Comsat's claims about discrimination are not persuasive. AMSC is a common carrier, which, accordingly, has a duty not to discriminate,[294] as does AT&T. Therefore, to the extent that Comsat has been harmed by unreasonable discrimination by AT&T, or in the future is harmed as a result of unreasonable discrimination by either AT&T or AMSC, recourse is available to Comsat through the Commission's complaint process or in the courts. Thus, conditioning our approval of this merger on a

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[291] AMSC Reply Comments at 1-3.

[292] Comsat Comments at 4.

[293] Land Mobile Satellites 2 FCC Rcd at 490; CMRS Second Report, 9 FCC Rcd at 1467; see Rules and Policies Pertaining to a Mobile Satellite Service, Notice of Proposed Rulemaking, 9 FCC Rcd 1094 (1994). Current and future competitive services include cellular, offshore radio, rural radio, private land mobile radio, specialized mobile radio, radio determination satellite service, basic exchange telecommunications radio, and, eventually, low earth orbit satellites and PCS. As we have discussed previously, wireless telecommunications are likely to become more competitive in the near future. See ¶¶ 40-41, supra.

[294] Land Mobile Satellites, 2 FCC Rcd at 490.

nondiscrimination requirement would be duplicative and without benefit.

134. We are currently conducting a rulemaking and inquiry proceeding to examine whether and to what extent a variety of commercial mobile radio service providers, including mobile satellite service providers such as AMSC, should be subject to equal access and interconnection obligations. In the CMRS Notice, we took no position on whether non-cellular CMRS providers should be subject to an equal access obligation.[295] Likewise, we take no position here on whether an equal access obligation should be imposed on AMSC, other than that we are not convinced on the record before us that the instant merger necessitates the imposition of such an obligation.[296] Comsat had an opportunity to file comments and has an opportunity to file reply comments in the rulemaking proceeding.

135. We are not convinced that AT&T/McCaw will gain control of AMSC. It appears to us that the public offering may well result in a dilution of McCaw's interest. We fail to see how McCaw's ownership interest could increase as a result of the public offering when McCaw has not committed to purchase shares while other large shareholders have so committed. Thus, Comsat's argument that other large shareholders' interests could be diluted by the public offering applies equally, if not more so, to McCaw. We recognize that AT&T/McCaw may purchase shares later in an effort to gain control of AMSC. If so, we will under our rules examine that transaction. Further, although Comsat argues that the 31.5% ownership interest, even absent control, may itself be sufficient incentive for AT&T/McCaw to favor AMSC over other satellite carriers, we are not convinced that the instant merger represents a significant threat to competition in maritime mobile satellite services.[297] If the need arises, we will revisit the issue of competition in maritime mobile satellite services in an appropriate proceeding.

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[295] See CMRS Notice, 9 FCC Rcd at ____ [¶ 44-49].

[296] We reiterate that we are not here to equalize the competitive advantages enjoyed by certain competitors. See n. 80, supra.

[297] The 31.5% figure is an aggregate of the ownership interests in AMSC held by McCaw, including the interests of McCaw's partially-owned subsidiaries. AT&T and McCaw Opposition at 162. This indirect ownership reduces, in our view, the incentive and the likelihood that AT&T will attempt to engage in anticompetitive behavior with regard to AMSC and its competitors because the revenue flows from AMSC to AT&T are so indirect that AT&T could not be assured of reaping any substantial benefit as a result of its anticompetitive behavior.

136. Finally, if we were to impose restrictions on AMSC, this proceeding is not the proper forum to do so. AMSC is not a party to the instant merger, and Comsat has not shown that McCaw exercises such control over AMSC that AMSC should be subject to restrictions by virtue of its relationship with McCaw. Even if we were to require McCaw to impose restrictions on AMSC, it is not clear that McCaw exercises sufficient control over AMSC to enforce those restrictions.[298]

D. Miscellaneous / Other Claims

1. Exemption from Cut-Off Rules

137. The applicants have requested a general exemption from the "cut-off" rules that affect pending cellular, other Part 22, and point-to-point microwave applications included in the instant proposed transfer of control. Their request is granted. Sections 22.23 and 21.23 of the Commission's Rules state that an amendment to an application will be considered to be major and thereby render the application newly filed. As such, the application becomes subject to the "cut-off" provisions, unless the amendment arises out of an assignment or transfer of control that is for legitimate business purposes other than the acquisition of applications.[299] The scope of the transactions between McCaw and AT&T demonstrate that the proposed merger is for the transfer of control of an ongoing, operating business, in which the affected applications play only an ancillary role. Consequently, the amendments to these applications will not be considered to be major for the purpose of triggering the "cut-off" rules.[300]

2. HCTC Agents

138. HCTC Agents, whose concern is solely with the proposed transfer of control of Houston Cellular Telephone Company ("HCTC"), licensee of Domestic Public Cellular Radio Telecommunications Service ("DPCRTS") Station KNKA367 (File No.

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[298] See Comsat Reply Comments at 3.

[299] See 47 C.F.R. §§ 22.23(g)(3), 21.23(c)(6).

[300] See, e.g., Airsignal International, Inc., 81 FCC 2d 472 (1980). The applicants also requested that grant of the instant transfer of control applications include authority for AT&T to acquire control of all radio authorizations controlled by McCaw and applications filed by McCaw, including any authorization issued to McCaw's subsidiaries and affiliates during the pendency of this proceeding and during the period required to consummate the transaction following our approval thereof. FCC Form 490, Exhibit 3 at 10-11. Such request is granted.

05341-CL-TC-1-93),[301] contends that the application should be denied because it appears that McCaw has acquired negative control of HCTC from BellSouth Corporation without obtaining prior Commission authorization. HCTC also argues that McCaw has restricted the resale of cellular service, discriminated in its provision of cellular service to its affiliates vis-vis non-affiliated entities, and unlawfully bundled cellular equipment and service. Alternatively, if the application is granted, HCTC requests that the proposed transfer of control be conditioned on reexamination and reconsideration of AT&T's qualifications to hold a cellular license following a decision in the now pending complaint proceeding Cellular Marketing, Inc. v. Houston Cellular Telephone Company, File No. E-89-273.

139. HCTC Agents submit that they have standing to oppose the transfer of control of HCTC from McCaw to AT&T because HCTC has allegedly engaged in conduct violative of the Communications Act and the Commission's rules and policies that has caused them economic harm. HCTC Agents have not, however, shown that a grant of the subject application would result in, or be reasonably likely to result in, some injury of a direct, tangible, or substantial nature. HCTC Agents, therefore, have not demonstrated that they have standing.[302] Moreover, HCTC Agents fail to establish sufficient grounds for denial or dismissal of this transfer of control application. They base their allegations of unauthorized transfer of control upon a mistaken reading of the ownership chart accompanying the application. The Commission's records indicate that McCaw, through various subsidiaries, holds a 56% equity interest and a 50% voting interest in HCTC, and that BellSouth, through its subsidiaries, controls the remaining equity and voting interests in HCTC. In other words, McCaw, by virtue of its majority stock ownership, has de jure control of HCTC, and by virtue of its voting rights, it shares de facto negative control of HCTC with BellSouth. Consequently, because McCaw proposes to transfer all of its interests in HCTC, it is obligated by Section 310(d) of the Act,[303] and Section 22.39(a)(1) of the Commission's Rules,[304] to acquire Commission approval prior to transferring its interests in HCTC to AT&T. McCaw is not, however, required to include in its transfer of control application, as inferred by HCTC Agents, the holdings of the licensee's remaining principal, which are not being transferred, although this issue probably would not have been raised had McCaw done so.

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[301] HCTC Agents' petition mistakenly refers to the application as having File No. 05288-CL-TC-1-93.

[302] See, e.g., Brian L. O'Neill, 6 FCC Rcd 2572 (1991).

[303] 47 U.S.C. § 310(d).

[304] 47 C.F.R. § 22.39(a)(1).

140. The alleged anticompetitive conduct of HCTC is the subject of a pending formal complaint proceeding that was initiated by HCTC Agents. The allegations do not concern AT&T as the proposed transferee and, as such, they are not relevant to the Commission's determination of whether AT&T is qualified to assume control of HCTC.[305] As HCTC Agents have been advised previously, these allegations must await resolution in the pending formal complaint proceeding.[306] Nor have HCTC Agents shown a need to condition the proposed transfer of control upon the outcome of that proceeding. Therefore, in view of the foregoing, HCTC Agents' petition to deny shall be dismissed without prejudice to whatever action the Commission may find appropriate with respect to their pending formal complaint, and the petition otherwise is denied.

3. Matters Involving LIN Broadcasting Corporation and Its Broadcast Licensee Subsidiaries

a. Background

141. The proposed AT&T-McCaw merger will result in a transfer of control from Craig O. McCaw to AT&T of LIN Broadcasting Corporation and LIN Television Corporation (LIN),[307] which, through its wholly owned licensee subsidiaries, holds Commission licenses for eight television stations.[308] Those stations are: KXAS-TV, Channel 5 (NBC), Fort Worth, Texas; WISH-TV, Channel 8 (CBS), Indianapolis, Indiana; WOOD-TV, Channel 8 (NBC), Grand Rapids, Michigan; WAVY-TV, Channel 10 (NBC), Portsmouth, Virginia; KXAN-TV, Channel 36 (NBC), Austin, Texas; WAND(TV), Channel 17 (ABC),

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[305] See MMM Holdings, Inc., 4 FCC Rcd 6838, 6845 (Com. Car. Bur./Mass Med. Bur. 1989), aff'd, 4 FCC Rcd 8243 (1989).

[306] MMM Holdings, 4 FCC Rcd at 6845.

[307] LIN Broadcasting Corporation is controlled, and 52.5%-owned, by MMM Holdings, Inc. (MMM Holdings), a wholly owned subsidiary of McCaw Cellular Communications Corp. (MCCI), which, in turn, is controlled by Craig McCaw. Under the Agreement and Plan of Merger between MCCI and AT&T, MCCI will merge with, and become, a wholly owned subsidiary of AT&T.

[308] On June 29, 1994, LIN filed an application seeking consent to the assignment of the license for a ninth television station, WTNH-TV (ABC), Channel 8, New Haven, Connecticut, from Cook Inlet Communications Corp. to LIN Television Corporation. FCC File No. BALCT-940629LB. As of the release date of this Order, that application is still pending, as are the pro forma transfer of control applications, FCC File Nos. BTCCT-940629KE through KZ and BTCCT-940629LA, which are contingent upon that assignment application and contemplate a spin-off of LIN Broadcasting Corporation to its shareholders.

Decatur, Illinois; WANE-TV, Channel 15 (CBS), Fort Wayne, Indiana; and KXAM-TV, Channel 14 (NBC), Llano, Texas.[309] Continuing authority to operate station KXAM-TV, Llano, as a "satellite" of station KXAN-TV, Austin, is also requested by the applicants. The National Association of Black Owned Broadcasters, Inc. (NABOB) filed an informal objection in general opposition to the proposed McCaw-AT&T transaction, but not specifically against the continuing satellite request.[310] AT&T and Craig McCaw jointly replied.

b. Continuing Satellite Authorization

142. In November 1990, the Commission granted the application for assignment of unbuilt television station KXAM-TV, formerly KLNO(TV), Llano, to a licensee subsidiary of LIN.[311] Because the predicted Grade B contour of KXAM-TV overlapped with that of LIN station KXAN-TV, Austin, LIN requested at that time, and was granted, the authority to operate KXAM-TV primarily as a satellite of KXAN-TV.[312] Shortly thereafter, in July 1991, the Commission adopted a new standard for evaluating requests for television satellite status, including those seeking to transfer or assign satellite stations.[313] Consequently, although LIN has been authorized to operate KXAM-TV as a satellite of KXAN-TV, a continuing satellite exemption request is necessitated by the merger of AT&T and McCaw.

143. The satellite exemption standard, for both new and continuing satellite exemptions, entitles an applicant to a presumption that its satellite proposal is in the public interest

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[309] Also to be transferred in the merger are six operating low power television (LPTV) stations, four construction permits in the same service, and a television translator station. The operating LPTV stations are: K21DK, Giddings, Texas; K32DA, LaGrange, Texas; K40CT, San Marcos, Texas; K49CY, Austin, Texas; W11BV, Indianapolis, Indiana; and W59CE, Hampton, Virginia. The LPTV construction permits are for: W22BG, Elizabeth City, North Carolina; W36BK, Mappsville, Virginia; W66BZ and W69CV, Suffolk, Virginia. The television translator station is W68AA, Danville, Illinois.

[310] Informal Objection of the National Association of Black Owned Broadcasters ("Informal Objection").

[311] Horseshoe Bay Centex Broadcasting Co., 5 FCC Rcd 7125 (1990).

[312] Id.

[313] Television Satellite Stations Review of Policy and Rules, 6 FCC Rcd 4212, 4215 (1991), recon. pending.

if three criteria are satisfied: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the satellite as a full-service station.[314] An applicant whose proposal is unable to qualify for the presumption will be evaluated on an ad hoc basis, and grant of the application will be made if there are other compelling circumstances.[315] In the case before us, the applicants fail to meet the first presumptive criterion in that the city grade contours of KXAM-TV and KXAN-TV overlap, as determined by the standard prediction method. Therefore, we shall evaluate the continuing satellite request on an ad hoc basis, assessing the compelling circumstances set forth by the applicants. First, according to the applicants' engineering exhibit, the city grade contour overlap area encompasses 1,095 square kilometers (423 square miles) with a population of 7,628. This overlap, the applicants maintain, constitutes 19.6 percent of the population and 13.6 percent of the area of the city grade contour of KXAM-TV and 0.9 percent of the population and 11.8 percent of the area of the city grade contour of KXAN-TV.

144. Second, the applicants assert, KXAM-TV provides service to an underserved area, as defined by the "transmission test." That test, which deems the satellite's community of service as underserved if it has two or fewer full-service stations already licensed to it, is readily satisfied here: KXAM-TV is the only television station licensed to Llano.

145. Finally, according to an opinion rendered for the applicants by media broker and appraiser Blackburn & Company, Inc. (Blackburn), there are two primary factors militating against any "knowledgeable" broadcaster attempting a full-service operation of KXAM-TV: (1) the Llano market is too small; and (2) the larger Austin market is too distant and too saturated to accommodate a Llano-licensed station. Specifically, Llano, a town of less than 5,000 population, is situated in Llano County, with less than 15,000 population, and located 60 miles northwest of Austin. The Grade B signal of KXAM-TV does not reach the city of Austin, but its fringe signal covers the western half of Travis County, in which Austin is located, and approximately one-fourth of the market area also covered by the four existing Austin television stations. The stations are ABC, CBS, NBC and Fox affiliates.[316] Consequently,

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[314] Id. at 4212.

[315] Id. at 4214.

[316] There is also a construction permit authorized for a full-service station on Channel 54, licensed to Austin. This station, according to Blackburn, will cover the entire Austin market and, consequently, will have a "better chance of survival"

the Blackburn opinion states, the Llano market is "far too small and too sparsely populated" to support any full-service television station, especially an independent operation. Indeed, Blackburn asserts that no network affiliation would be available to a Llano station because of the proximity to Austin. Nor would it be feasible, Blackburn claims, to market a Llano full-service station based upon service to Austin, because KXAM-TV reaches only about a quarter of that city's market, excluding the city itself. Even if a full-service station in Llano were to attain better coverage of the Austin market, Blackburn notes, such a station would represent a fifth Austin station. The smallest markets currently able to "marginally" support a fifth television operation, Blackburn observes, are Oklahoma City, Oklahoma, the nation's forty-fifth largest television market, with $61 million in annual television revenues, and Memphis, Tennessee, the forty-second largest market, with $55 million in annual television revenues. The Austin market ranks sixty-sixth, with annual television revenues of $41 million.

146. In evaluating a request for parent-satellite operation of stations on an ad hoc basis, whether for a new combination or a continuing one, we are to look to the proposal's "degree of departure" from the presumptive criteria for guidance.[317] Here, the city grade contours of KXAM-TV and KXAN-TV intersect, departing from the first criterion, and no attempts were made to solicit offers for the Llano station, departing from the third criterion. These departures, however, are mitigated by the fact that the delivery of a KXAM-TV signal constitutes the only Grade B television service to significant portions of Llano, Mason, San Saba and Lampasas counties and the second such service to other portions of Mason, San Saba and McCulloch counties, all located west and northwest of Austin. Moreover, weekday inserts in NBC's "Today" program provide Llano county residents with their only local news service. Finally, we are persuaded by the Blackburn opinion that even if the applicants had attempted to spin off KXAM-TV from the other merger assets, such efforts would have been in vain given the economic impracticability of operating a full-service station licensed to Llano. We conclude, therefore, that the applicants have demonstrated that compelling circumstances warrant approval of the continued operation of KXAM-TV as the satellite station of KXAN-TV, Austin, under the ultimate control of AT&T.

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than a station such as KXAM-TV, whose community of license is Llano.

[317] Television Satellite Stations, 6 FCC Rcd at 4214, 4215 n. 23.

c. Other Media Interests of AT&T Directors

147. AT&T has no attributable interest in any broadcast station. But four of its "outside," or non-management, directors also hold seats on the boards of companies implicating the Commission's multiple and cross-ownership rules.[318] Specifically, AT&T directors Carla A. Hills and Donald S. Perkins are directors of Time Warner, Inc., which owns and/or operates cable television systems throughout the country, several of which are within the Grade B contour of five of the eight LIN television stations.[319] Attribution of the LIN stations to Hills and Perkins, therefore, would violate the statutory, as well as the Commission's, cable-television cross-ownership prohibition.[320] Further, AT&T directors Henry B. Schacht and Franklin A. Thomas sit on the board of CBS, Inc. (CBS), which owns or controls eight AM, thirteen FM, and ten television stations in the United States. Attribution of the eight LIN television stations to Schacht and Thomas, in conjunction with the ten CBS television stations, would violate the Commission's twelve-station rule, Section 73.3555(d), and the one-to-a-market rule, Section 73.3555(b), in that two of the CBS FM stations, KTXQ(FM), Dallas-Fort Worth, and KRRW(FM), Dallas, are located in the same market as LIN's KXAS-TV.

148. AT&T requests, pursuant to Note 2(h) of Section 73.3555, that the four directors be relieved of attribution of the LIN stations, thereby avoiding statutory and rules violations, because AT&T is a "multi-faceted parent corporation primarily engaged in the telecommunications industry. According to AT&T, the soon-to-be-acquired 52.5% interest in LIN,[321] "a very small part of the operations overseen by AT&T's Board of Directors," permits the four directors to be recused from matters concerning LIN and its

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[318] See Attribution of Ownership Interests, 97 FCC 2d 997, 1025 (1984).

[319] In July 22, 1994 response to a staff inquiry letter, the applicants reported that Time Warner cable systems operate in: Urbana, Illinois, within the Grade B contour of WAND(TV); Hendricks County, Indianapolis, within the Grade B contour of WISH-TV; Warsaw, Indiana, within the Grade B contour of WANE-TV; Austin, Barton Creek Estates, Bastrop and Luling, Texas, within the Grade B contour of KXAN-TV; and Hampton, Virginia, within the Grade B contour of WAVY-TV. In the event LIN assumes ownership of WTNH-TV, New Haven, see n. 308, supra, that station's Grade B contour will overlap the service area of a Time Warner cable system in Litchfield, Connecticut.

[320] 47 U.S.C. § 533(a)(1); 47 C.F.R. § 76.501(a).

[321] See n. 307, supra.

licensee subsidiaries. The Commission recently recognized director recusal from a multi-faceted corporation's television business as a predicate for relief from attribution.[322] In crafting a "limited means" of relieving corporate officers and directors of attribution, the Commission explained that such relief should be "narrow," that is, not intended to permit disclaimer of positional interests "as a matter of course."[323] In this case, we are reassured by AT&T's "well-established" procedure for recusing directors with special interests or conflicts, one insuring that the directors' need for recusal, "in the rare event" a LIN-related matter is before the board, will be signaled by appearance of that issue on the agenda. This notification, AT&T observes, will prevent materials pertaining to LIN from being shared with affected board members and will allow ample opportunity for those four directors to refrain from participating in the LIN issues. As to the board's financial oversight, which necessarily encompasses all corporate businesses, including those of LIN, AT&T notes that its financial reports generated for the board are "sufficiently aggregated" so that LIN's performance figures will not be separately displayed. Any reports with other information, AT&T adds, will be circulated through the secretary's office, permitting any discrete information concerning LIN to be "blocked" before distribution to directors with conflicts. Given these AT&T board procedures, we believe that the four directors can strictly observe their pledges to recuse themselves from issues relating to LIN. Accordingly, we will require Hills, Perkins, Schacht, and Thomas to recuse themselves from all matters that involve and/or implicate the merged entity's television business.

d. NABOB's Informal Objection[324]

Contentions

149. NABOB objects to the proposed merger absent a demonstration from the applicants that efforts were made to sell the McCaw-controlled television stations to minority-owned

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322 Viacom, Inc., 9 FCC Rcd 1577, 1579 (1994).

323 Attribution, 97 FCC 2d at 1025.

324 The applicants contend that NABOB's objection, filed on the December 2, 1993 deadline for filing reply comments, rather than on the November 1, 1993 deadline for initial comments, should be dismissed as untimely filed. See Public Notice, DA 93-1119, released September 15, 1993. We disagree. Under Section 73.3587 of the Commission's Rules, "any person" may file informal objections "[b]efore FCC action on any application for an instrument of authorization. . . ." NABOB's objection, therefore, is timely filed and will be considered.

companies. Alternatively, NABOB urges the Commission to condition any grant of the AT&T-McCaw application upon a showing that the merger will have a "positive impact" on the ownership and control of communications facilities by minorities. In support of its alternate requests, NABOB points to the Commission's so-called "policy" between 1978 and 1980, in which the Commission purportedly granted an applicant's request for waiver of a rule only if the parties made the showing it now urges we require of AT&T and Craig McCaw. NABOB contends that like the applicants in Combined Communications Corp.,[325] and Miami Valley Broadcasting Corp.,[326] AT&T and McCaw seek a waiver of the "cut-off" rules for major amendments under Parts 21 and 22, a request now warranting invocation of that earlier "policy."

Discussion

150. The Commission has instituted policies for fostering transfers of broadcast stations to minority-owned or controlled entities.[327] But it has never adopted a policy which either compels, or requires demonstration of attempts to effectuate, such transfers.[328] And it did not do so in Combined Communications or in Miami Valley Broadcasting. In each of those cases, where the transferring applicant sought waiver of the then-applicable anti-trafficking "three-year rule" for several spin-off licenses in a station-group purchase, the Commission looked to transfers of those spin-offs to minority-controlled entities as but one of several public interest benefits. In Combined Communications,[329] the public interest factors favoring waiver of the three-year rule, in addition to assignment of a television station to a minority-controlled corporation, were the break-up of an AM-FM-TV combination in one market, the break-up of a TV-newspaper combination in another, and the potential divestiture of AM-FM combinations in six markets. And in Miami Valley Broadcasting,[330] the Commission noted that waiver of the three-year rule would benefit the public not only because several media properties were to be spun off to minorities, but because break-ups

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[325] 72 FCC 2d 637 (1979), recon. denied, 76 FCC 2d 445 (1980).

[326] 78 FCC 2d 684 (1980).

[327] E.g., Minority Ownership in Broadcasting, 92 FCC 2d 849 (1982).

[328] See Univision Holdings, Inc., 7 FCC Rcd 6672, 6683 (1992), recon. denied, 8 FCC Rcd 3931 (1993).

[329] 76 FCC 2d at 448-449.

[330] 78 FCC 2d at 720-21.

of various combinations would occur in five markets and the applicant agreed to commit up to a half million dollars over three years for the production of children's programming. Thus, the Commission neither solely relied on the transfer to a minority nor required that action as the predicate for granting waivers of the three-year rule in those proceedings or any other. Accordingly, whether the Commission exempts the applicants here from the cut-off requirements of Part 21, governing Common Carrier Services, and Part 22, governing Public Mobile Service, is a matter to be determined by standards governing such exemptions alone and not by the applicants' attempts to sell to minority entities.[331] Indeed, Section 310(d) provides that when acting on assignment or transfer applications, "the Commission may not consider whether the public interest. . . might be served by a transfer, assignment or disposal of the . . . license to a person other than the proposed transferee or assignee." Consequently, our obligation here is to determine whether transfer of control of McCaw to AT&T, as the proposed transferee, would serve the public interest.

151. Having considered the above, we find that NABOB has failed to establish a prima facie case that a grant of the application would not serve the public interest. We also find that the applicants are fully qualified and that a grant of the transfer of control application would serve the public interest.

3. The Ad Hoc IXCs

Petitions and Other Filings

152. The Ad Hoc IXCs, members of a self-described "coalition of small interexchange carriers that resell the common carrier services of [AT&T]" and other interexchange carriers,[332] argue that the Commission should deny the proposed merger because AT&T/McCaw would have a greater opportunity to continue anticompetitive activity against rival IXCs, including resellers.[333]

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[331] As NABOB notes, major amendments of mutually exclusive applications are subject to filing cut-off rules. Applications for transfer of control as a result of a merger, however, will not be treated as major amendments subject to cut-off. See Airsignal International, Inc., 81 FCC 2d 472 (1980). See also 47 C.F.R. §§ 22.23(g)(3), 22.922(a)(2), 21.31(e)(3) of the Commission's rules. Accordingly, as determined above, waivers of those cut-off rules have been granted.

[332] Ad Hoc IXCs Petition at i,2.

[333] Id. at i. The Ad Hoc IXCs state that if it does not deny the requested license transfers, the Commission must, at a minimum set the applications for an evidentiary hearing. Id. at 28.

The Ad Hoc IXCs allege that AT&T has intentionally subjected resellers to a pattern of unlawful conduct, including intentionally interfering with and damaging successful resale of AT&T's most attractive bulk service offerings.[334] The Ad Hoc IXCs further argue that the various reseller lawsuits create strong inferences that AT&T has effective control of competition in the resale segment of the long distance industry, and that AT&T has misrepresented its support for resale to gain greater regulatory freedom while simultaneously seeking to eliminate the competitive impact of resale on AT&T's direct service.[335]

Opposition to Filings

153. AT&T and McCaw contend that the Ad Hoc IXCs' allegations regarding AT&T's treatment of resellers are completely unsubstantiated.[336] AT&T and McCaw argue that allegations concerning resale of AT&T interexchange services should be addressed in other fora, not in the instant proceeding.[337] In addition, AT&T and McCaw contend that even if the Ad Hoc IXCs' allegations could be made in the instant proceeding, the Ad Hoc IXCs have failed to present specific allegations of fact sufficient to show that approval of the proposed merger would be prima facie inconsistent with the public interest.[338]

Discussion

154. We find that the Ad Hoc IXC's generalized allegations regarding AT&T's resale practices do not raise substantial and material questions of fact regarding AT&T's qualifications or the public interest benefits of the proposed merger. We note that specific allegations of misconduct have been raised in several pending formal complaint proceedings filed with the Commission pursuant to Section 208 of the Communications Act[339]

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[334] Id. at 4. According to the Ad Hoc IXCs, various resellers have filed over 20 complaints that directly relate to the issues of market size and financial strength which are relevant to the public interest determinations that the Commission must make. Ad Hoc IXCs Reply at 3.

[335] Ad Hoc's Reply at 6.

[336] AT&T and McCaw Opposition at 156-57.

[337] Id. at 157.

[338] Id. at 160.

[339] 47 U.S.C. § 208.

by resale customers seeking damages and other injunctive relief.[340] The specific claims and allegations in these proceedings have been the subject of lengthy discovery proceedings, some of which are ongoing.[341] We believe that these pending formal complaint proceedings are a more appropriate forum for resolving issues pertaining to AT&T's treatment of resale customers. We find that the public interest would not be served by our withholding action on the proposed merger to conduct further fact finding based on the generalized allegations made by the Ad HOC IXCs in this proceeding. To the extent that the records established in the complaint proceedings establish violations of the Communications Act or the Commission's rules, we can fashion the appropriate remedies including damages awards, forfeitures, and injunctive relief.

E. Procedural Issues

1. Application for Review and Motion for Production of Documents

Contentions

155. On June 6, 1994, BellSouth filed an application for review of the Bureau's May 26, 1994 ruling limiting the scope of the applicants' Hart-Scott-Rodino ("HSR") materials to be made available for review by Commission staff and counsel for the parties. BellSouth contends all of the HSR materials are relevant to the issues raised in this proceeding. It argues that the Bureau erred by refusing to require the applicants to produce all of their HSR filings. On June 14, 1994, NYNEX, PacTel, and SW Bell[342] filed a joint motion requesting the Commission to expand the scope of its HSR review and direct the applicants to make additional documents available for examination. The arguments[343] in support of and in

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[340] Members of the Ad Hoc IXCs, in their individual capacities, are among those resale customers that have filed the pending complaints. See, e.g., Affinity Network, Inc. v. AT&T (filed June 26, 1992) File No. E-92-96; NOS Communications, Inc. v. AT&T (filed July 28, 1992) File No. E-92-101.

[341] Both cases cited in the preceding note are the subject of ongoing discovery proceedings.

[342] We refer to NYNEX, PacTel, SW Bell, and BellSouth collectively as "the Companies".

[343] The application for review and the motion to compel, as well as responsive pleadings, were filed under seal. To give full effect to the Protective Order and avoid disclosure of confidential material that the Protective Order was designed to protect, we will

opposition to both the application for review and motion for production are substantially the same. The Companies argue that all of the HSR documents, or, at a minimum, documents specifically identified by the petitioners as relevant, should be reviewed by the Commission and made available for review and comment by the parties.

156. AT&T and McCaw oppose the application for review and the motion to expand review of their HSR filings. The applicants contend that the Commission has discretion to determine the means and scope of its fact finding in license application proceedings and that the Bureau acted reasonably in limiting the scope of its HSR review. AT&T and McCaw argue that the Companies have failed to show that review of additional HSR documents is necessary and merely seek to delay Commission action on the merger.

Discussion

157. The Commission has broad discretion to determine the scope of information required to complete its public interest analysis and the manner in which it will conduct its fact finding inquiries. Section 4(j) of the Act empowers the Commission to "conduct [our] proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[344] Section 308(b) gives the Commission discretion to determine what information it requires of license applicants in order to review the qualifications of those applicants.[345] Section 309(a) similarly states that the Commission may render a judgment of whether the public interest standard has been satisfied based on its review of the application and consideration of "such other matters as the Commission shall officially notice."[346] The courts have long recognized the Commission's discretion to control the manner in which factual inquiries in license application proceedings will be conducted.[347]

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generally summarize the arguments made in these pleadings.

[344] 47 U.S.C. § 154(j).

[345] Id. § 308(b).

[346] Id. § 309(a).

[347] See Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 630 & nn. 34, 36, 633-34 (D.C. Cir. 1978) (en banc) (Bilingual); cf. Comark Cable Fund III v. Northwestern Indiana Telephone Company, 104 FCC 2d 451, 460-61 & n. 20 (1985) (Commission has discretion in Section 208 proceedings to determine the kind of factual inquiry it will conduct and to make a decision on the facts it finds).

158. We find no reason to disturb the Bureau's decision to limit review of the applicants' HSR filings, nor have petitioners presented arguments that would persuade us to independently expand the scope of such review. The applicants' HSR filings with the DOJ total approximately 1200 boxes and cover numerous topics other than the analysis of the relevant markets in this proceeding. These materials were obtained by the DOJ pursuant to a separate and distinct statutory mandate and we are neither obligated nor equipped to duplicate in full the DOJ's review. We are satisfied that the Bureau reasonably identified documents and materials that would assist us in our consideration of the proposed merger and took the steps necessary to ensure that such materials were promptly made available for review by counsel for the parties. The petitioners have not shown that the relevance of HSR materials not designated for review by the Bureau outweigh the substantial burden production would pose for the applicants, this Commission, and the parties to this proceeding. Moreover, we note that the DOJ, which has the responsibility for examining the applicants' HSR filings, has completed its review and has raised no opposition to favorable action by this Commission on the merger request.[348]

2. AT&T's Motion to Disqualify or to Impose Sanctions

Contentions

159. On June 16, 1994, AT&T filed a motion requesting that we disqualify BellSouth from further participation in this proceeding, or impose sanctions, for alleged violations of the Bureau's Protective Order. The motion stems from a press release issued by BellSouth on June 7, 1994, which AT&T claims summarizes information contained in the applicants' HSR filings. AT&T contends that BellSouth's actions in issuing the press release constituted a clear and serious violation of the Protective Order that should subject BellSouth to immediate disqualification or, at a minimum, sanctions.

160. BellSouth opposes AT&T's motion, arguing that the press release reiterates a claim that BellSouth publicly made in its application for review of a Bureau ruling limiting the staff's and the parties' examination of the HSR filings.[349] BellSouth states that AT&T has misread the press release which, according to BellSouth, merely expresses the view that an examination of all of

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[348] On June 15, 1994, the DOJ, AT&T and McCaw entered into a proposed consent decree which, if approved by the U.S. District Court for the District of Columbia, permits AT&T and McCaw to merge subject to a number of specified conditions.

[349] See BellSouth Application for Review, Redacted Version, filed June 6, 1994 ("Application").

the applicants' HSR documents, as opposed to the selected documents designated by the Bureau, is required, and that such examination would support BellSouth's position regarding the competitive impact of the proposed merger. BellSouth argues that even if it is determined that a violation occurred, it has a statutory right to participate in the proceeding and there is no legal precedent that suggests that disqualification is the appropriate remedy.

Discussion

161. Initially, we note that both AT&T's motion and BellSouth's opposition were filed with the Commission under seal insofar as they contain and discuss information governed by the Bureau's Protective Order. To give full effect to the Protective Order, we will not, nor do we believe we need to, disclose the specific information in dispute in making a determination on this matter.

162. We have reviewed the portion of the June 7 press release at issue and conclude that BellSouth's disclosure of information in the press release violated express prohibitions set forth in the Protective Order. The order provides that "[e]xcept with the prior written consent of the applicants or other person originally designating a document to be stamped as a confidential document, or as [otherwise] provided under [the] order, no stamped confidential document may be disclosed to any person."[350] BellSouth's attempt to cast the press release as a reiteration of a position it previously stated in its application for review is unavailing. The plain language of the press release, which followed BellSouth's review of limited HSR materials designated for examination by the Bureau, purports to summarize the entire contents of the applicants' HSR filing based on such limited review. No reasonable reading of the press release suggests that its characterization of the applicants' HSR filings is one of belief, opinion, position, or speculation about documents not yet reviewed by BellSouth. Moreover, the language of the press release goes well beyond the generic position stated by BellSouth in its application for review.[351]

163. While we conclude that BellSouth's actions violated the Protective Order, we do not believe that disqualification is an

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[350] Protective Order at ¶ 2. The order provides for limited disclosure to counsel for parties of record. These provisions are inapplicable here.

[351] In its application for review, BellSouth describes the HSR documents that were not designated for review by the Bureau as "appear[ing] to be highly relevant," and as "likely to contain relevant information." BellSouth Application at 7, 19.

appropriate sanction.[352] It appears that the violation was isolated and not part of a recurring problem that would cause us greater concern. Moreover, we find the unauthorized disclosure in the press release to be vague and limited; thus, any actual or potential impact on applicants appears to be at most de minimis. We do, however, strongly admonish BellSouth for its actions. Protection of commercially sensitive materials submitted by parties pursuant to protective orders and confidentiality agreements is a very serious matter requiring vigilance by Commission staff as well as all parties gaining access to such information. Unauthorized disclosure of proprietary information could lead to substantial competitive and financial harm to the party submitting that information. Such disclosure could also undermine public confidence in the effectiveness and integrity of the Commission's processes, and have a chilling effect on the willingness of parties to provide us with information needed to fulfill our regulatory duties.[353]

164. Accordingly, we hereby admonish BellSouth to take all reasonable and necessary steps to ensure that any information designated as confidential that it has obtained, or might subsequently acquire in this proceeding, is accorded the full treatment and protection contemplated by the Bureau's Protective Order. Future violations could subject BellSouth to the maximum sanctions allowed under the Communications Act and the Commission's rules.

3. Bell Companies' Motion for Waiver of Protective Order

165. On June 20, 1994, Bell Atlantic, NYNEX, PacTel and SW Bell ("the Bell Companies") filed a joint motion requesting a limited waiver of the Protective Order[354] to permit them to provide

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[352] We see no public interest that would be served by disqualifying BellSouth, particularly at this late stage of the proceeding. We note that BellSouth has been an active participant in this proceeding and that, as a likely competitor of AT&T/McCaw, it has a substantial interest in the outcome.

[353] This is true even when we have authority to compel production of the information because an uncooperative participant could cause needless delay and otherwise burden the regulatory process. See Western Union Telegraph Company, 2 FCC Rcd 4485, 4486 (1987) (citations omitted) ("The government should not be forced to issue or litigate compulsory orders or impose sanctions to ensure that it will be able to collect valuable information.").

[354] See Letter from Gregory A. Weiss, Acting Chief, Enf. Div., Common Carrier Bureau, FCC, to Francine J. Berry, AT&T, 9 FCC Rcd 2610, 2613 (Enf. Div., Com. Car. Bur. 1994) (Protective Order attached), amended, Letter from Thomas D. Wyatt, Chief, Formal

a copy of their comments filed in this proceeding, including appended HSR documents, to the MFJ court for consideration in connection with their pending requests for waivers before the court. AT&T and McCaw each filed an opposition to the motion.

166. The Bell Companies have failed to present any compelling public interest to warrant waiver or modification of the Protective Order. Mere allegations that certain documents may be relevant, or even critical, to other proceedings does not support a waiver in the absence of such public interest showing.

167. Without the stringent limitations on the use and dissemination of materials contained in the Protective Order, AT&T and McCaw certainly would have opposed release to McCaw's competitors of their confidential HSR submission to the DOJ. We then would have been required to weigh the competitive significance of each document in the voluminous submissions made under seal and determine, in each instance, whether the public interest in disclosure outweighed AT&T's and McCaw's legitimate interests in protecting their private business data. This massive undertaking, and the inevitable disputes over our determinations, would have precluded disclosure in any reasonable time frame. Given the critical importance of the Protective Order in facilitating prompt access to voluminous materials, many of which undoubtedly could be withheld from public inspection under Exemption 4 of the Freedom of Information Act,[355] we believe that a waiver should be granted only in extraordinary circumstances when a compelling public interest has been demonstrated.

168. If the MFJ court wishes to examine copies of AT&T and McCaw records that constitute the HSR documents, either on its own motion or that of the DOJ or of the BOCs, the Bell Companies have not shown that the court lacks authority to do so. On the contrary, it appears that the MFJ expressly provides such authority.[356] Accordingly, we deny the Bell Companies' motion to waive the Protective Order.

Compl. & Inves. Branch, Enf. Div., Common Carrier Bureau, FCC, to Counsel for Parties of Record (dated May 20, 1994) (footnote 2 of Protective Order deleted at request of the Bell Companies to permit continued participation of their counsel of record in this and other proceedings).

[355] 5 U.S.C. § 552(b)(4).

[356] See MFJ, Sections VII, VIII(I), printed in United States v. AT&T, 552 F. Supp. 131, 231-32 (D.D.C.1982).

4. Adequacy of the Record

Comments and Other Filings

169. Several commenters contend that the record developed in this proceeding is inadequate to enable the Commission to make the required public interest determination. Ameritech argues that the Commission should conduct a de novo examination of the proposed merger and require AT&T and McCaw to produce evidence responding to the anticompetitive concerns raised by the commenters.[357] BellSouth urges the Commission to order AT&T and McCaw to provide, under oath, detailed facts and analysis supporting the claims in their public interest statement.[358] Similarly, the Ad Hoc IXCs contend that the AT&T/McCaw merger cannot be approved without a hearing on AT&T's qualifications.[359] NCRA also contends that the nature of the merger would dictate a hearing even if sufficient facts had been presented. It cites ABC-ITT Merger, 10 RR 2d 289 (1967), as an example of a case in which a Commission hearing was held to verify the facts and evaluate the merger.[360]

Opposition to Filings

170. AT&T and McCaw contend that the Commission has the authority under Section 310(d) both to evaluate whether the proposed merger serves the public interest and to impose conditions to this end. AT&T and McCaw further contend that while the Commission is also separately authorized to enforce Section 7 of the Clayton Act for mergers of common carriers, it merely considers competitive consequences in conjunction with its public interest analysis and leaves enforcement of Section 7 to the DOJ or the FTC.[361]

171. AT&T and McCaw further maintain that the Commission should grant their applications summarily without a hearing because no petitioner has presented a substantial or material issue of

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357 Ameritech Reply at 7.

358 BellSouth Reply at iv.

359 Ad Hoc IXCs Petition at ii.

360 NCRA Comments at 4-6.

361 AT&T and McCaw Opposition at 11-12.

fact.[362] AT&T and McCaw argue that the issues are straightforward and that there is no basis for requiring a hearing. AT&T and McCaw contend that the question is whether this transfer would serve the public interest, convenience and necessity.[363] They assert that the benefits of the merger are undisputed and indisputable because the merger will turn a highly leveraged McCaw into a more effective competitor in existing and emerging wireless markets.[364] AT&T and McCaw specifically note that there is no dispute that AT&T will offer McCaw substantial financial resources, access to research and development at Bell Labs, experience in developing communications systems, a strong brand name, and sophisticated marketing operations and customer service capabilities.[365]

Discussion

172. As previously noted,[366] Section 310(d) of the Act requires that we find that "the public interest, convenience, and necessity will be served" before control over any radio construction permit, station license or any rights thereunder may be transferred. The "full hearing" requirement under Section 309(e) is triggered only where the Commission is unable to make such finding without such a hearing, or where "a substantial and material question of fact is presented."[367]

173. We have examined the issues and arguments raised by the parties and find no substantial and material question of fact that would require the full evidentiary hearing contemplated by Section 309(e). The record developed in this proceeding is voluminous. Commission staff and counsel for some parties have reviewed thousands of pages of documents filed by the applicants with the DOJ in connection with that agency's review of the proposed merger under provisions of the Hart-Scott-Rodino Antitrust Improvements Act.[368] Significantly, the arguments and allegations presented by the parties in this proceeding do not reflect disputes over material facts but focus primarily on inferences and conclusions to be drawn from the facts, namely, the competitive impacts of the merger. No persuasive showing has been made that a

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362 Id. at 18.

363 Id. at 10.

364 Id. at 31.

365 Id. at 33-35.

366 See n. 1, supra.

367 47 U.S.C. § 309(e); see also ¶ 52, supra.

368 See n. 15, supra.

full evidentiary hearing would produce additional facts that would assist us in any meaningful way to resolve the various claims and arguments raised by the parties. A full evidentiary hearing is neither required nor desired under the circumstances.[369] We are satisfied that all of the parties in this proceeding have been provided a full and fair opportunity to participate and set forth their views regarding the impact of the proposed merger. Accordingly, we deny the requests to designate this proceeding for a full evidentiary hearing.

IV. CONCLUSION

174. We conclude that, subject to the conditions we have imposed in this Order and subject to any rules we may adopt in the CMRS Notice proceeding or subsequent orders, the public interest, convenience, and necessity will be served by grant of the applications here before us.

V. ORDERING CLAUSES

175. Accordingly, having reviewed the applications and the record in this matter, IT IS ORDERED, pursuant to Sections 4(i) and (j), 309, 310(d), and 702(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 309, 310(d), 602(d), that the applications filed by AT&T and Craig O. McCaw in the above-captioned proceeding ARE GRANTED, subject to the following conditions.

176. IT IS FURTHER ORDERED that, effective upon consummation of the proposed merger, AT&T/McCaw cellular companies shall provide their current and future customers with the option to obtain McCaw's local cellular service and AT&T's interexchange service on an unbundled basis.

177. IT IS FURTHER ORDERED that AT&T/McCaw may provide local and long distance services on a bundled or packaging basis provided that the end-to-end rate (comprised of the combined charges for air-time and IXC service) shall not be less than the rate charged the general public and resellers for the air-time portion alone; and PROVIDED FURTHER that such rate shall be the higher of (a) the price that either of the applicants paid for the other applicant's service, or (b) the price either of the applicants would have paid for the same service if it were unaffiliated with the other applicant.

178. IT IS FURTHER ORDERED that AT&T/McCaw shall be subject to the same Customer Proprietary Network Information

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[369] See AT&T-All America Cables and Radio, Inc., 2 FCC Rcd 3948, 3952 (1987).

requirements as currently apply to AT&T's marketing of CPE and enhanced services.

179. IT IS FURTHER ORDERED that all transactions between AT&T and McCaw will be subject to the Commission's Affiliate Transaction Rules until further order of the Commission.[370]

180. IT IS FURTHER ORDERED that AT&T shall file revisions to its Cost Allocation Manual promptly upon the consummation of the proposed merger, and that the 60-day filing requirement for revisions involving cost categories and allocation mechanisms or allocation of employee time is waived for this filing.

181. IT IS FURTHER ORDERED that AT&T/McCaw shall ensure that AT&T directors identified in paragraphs 147-148, supra, recuse themselves from all matters that involve and/or implicate AT&T/McCaw's television business.

182. IT IS FURTHER ORDERED that AT&T shall not unreasonably discriminate in favor of McCaw and against other purchasers in the supply of cellular network products and services that are intended to be proprietary to the purchaser or for the exclusive use of the purchaser.

183. IT IS FURTHER ORDERED that AT&T shall not develop cellular network products or services that are intended to be proprietary to McCaw, or for the exclusive use of McCaw, without first having entered a written contract which shall clearly and specifically describe, at a minimum, the cellular network product or service to be developed, the consideration to be given, and the terms and conditions under which the said cellular network product or service will be made available to other customers.

184. IT IS FURTHER ORDERED that AT&T shall not unreasonably discriminate in favor of McCaw and against other purchasers in the supply of cellular network products and services pursuant to contracts that have not been fully performed on the release date of this Order.[371]

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[370] See AT&T and McCaw Opposition at 63, n. 117, supra.

[371] The term "cellular network products," as used in ¶¶ 182-183, herein, includes features, functions, hard-ware, software, improvements and updates thereof, and other components of complete cellular networks; and "services" includes delivery, installation, maintenance, and repair.

185. IT IS FURTHER ORDERED that AT&T/McCaw cellular companies shall comply with any equal access rules that the Commission may adopt in the CMRS Notice proceeding or in such further orders as the Commission deems appropriate.

186. IT IS FURTHER ORDERED that the "Petition to Impose Conditions," filed by the Bell Atlantic companies, IS GRANTED in part and otherwise IS DENIED.

187. IT IS FURTHER ORDERED that the "Petition for Conditional Approval," filed jointly by NYNEX Corporation and Pacific Bell, IS GRANTED in part and otherwise IS DENIED.

188. IT IS FURTHER ORDERED that the "Petition to Impose Conditional Grant To Create a Competitive Market, or Deny as Filed," filed jointly by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Enterprises, Inc., IS GRANTED in part and otherwise IS DENIED.

189. IT IS FURTHER ORDERED that the "Petition of Southwestern Bell Corporation to Impose Conditions or, in the Alternative, to Deny," IS GRANTED in part and otherwise IS DENIED.

190. IT IS FURTHER ORDERED that the Petition to Deny filed by the Ad Hoc IXCs on November 1, 1993, as supplemented on June 20, 1994, IS DENIED.

191. IT IS FURTHER ORDERED that the "Petition to Deny of National Cellular Resellers Association" IS DENIED.

192. IT IS FURTHER ORDERED that the "Petition to Dismiss or Deny" directed against the proposed transfer of control of Houston Cellular Telephone Company, File No. 05341-Cl-TC-1-93, filed jointly by Cellular Marketing, Inc., Lawrence Communications Company, Car Telephones, Inc., and Key Cellular, Inc. IS DISMISSED IN PART and OTHERWISE IS DENIED.

193. IT IS FURTHER ORDERED that the "Informal Objection of the National Association of Black Owned Broadcasters," filed December 2, 1993, IS DENIED.

194. IT IS FURTHER ORDERED that informal objections filed jointly by Maxcell Telecom Plus, Inc. and TPI Enterprises, Inc. on December 14, 1993, ARE DENIED.

195. IT IS FURTHER ORDERED that the applicants' request for a general exemption from the "cut-off" rules under Parts 21 and 22 of the Commission's Rules, and their request that our approval of transfer of control to AT&T of radio authorizations now controlled by McCaw include all such authorizations, ARE GRANTED.

196. IT IS FURTHER ORDERED, pursuant to Section 214(c) of the Communications Act of 1934, as amended, 47 U.S.C. § 214(c), and Section 63.01 of the Commission's Rules, 47 C.F.R. § 63.01, that the application of Continental Intercell, Inc. ("Continental"), File No. I-T-C-93-308-TC IS GRANTED and we consent to the transfer of control from Craig O. McCaw to AT&T of the international Section 214 authorization held by Continental, granted in File No. I-T-C-91-046.

197. IT IS FURTHER ORDERED that the Application for Review (and request for expedited action by June 13, 1994) filed June 10, 1994, by BellSouth IS DISMISSED in part as moot and otherwise IS DENIED.

198. IT IS FURTHER ORDERED that the "Emergency Motion of the Bell Companies to Require the Production of Additional Documents and Information," jointly filed by the Bell Atlantic Companies, NYNEX Corporation, Pacific Bell, and Southwestern Bell Corporation on June 14, 1994, IS DENIED.

199. IT IS FURTHER ORDERED that the "Motion of AT&T Corp. to Disqualify BellSouth from Further Participation in this Docket or to Impose Other Sanctions for Violation of Protective Order" and request for expedited action by June 20, 1994, filed under seal on June 16, 1994, IS DISMISSED in part as moot, IS GRANTED in part, and otherwise IS DENIED.

200. IT IS FURTHER ORDERED that the "Motion of the Bell Atlantic Companies, NYNEX Corporation, Pacific Bell, and Southwestern Bell Corporation for a Waiver of the Protective Order in the Interest of Justice," filed under seal on June 20, 1994, IS DENIED.

201. IT IS FURTHER ORDERED that the "Motion of Pacific Bell and Southwestern Bell Corporation for Emergency Consideration of Their Motion for a Waiver of the Protective Order in the Interest of Justice," filed under seal on July 15, 1994, IS DENIED.

202. IT IS FURTHER ORDERED that the "Request for Disclosure and Additional Briefing," filed by Bell Atlantic on August 12, 1994, IS DENIED.

203. IT IS FURTHER ORDERED that the "Motion of the Bell Atlantic Companies to File Justice Department Letter Regarding Conditions for Integrating Cellular and Long Distance Services," filed June 23, 1994, IS GRANTED.

204. IT IS FURTHER ORDERED that this order SHALL BE EFFECTIVE upon release in accordance with 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

Petitions to Impose Conditions

Bell Atlantic Companies ("Bell Atlantic")

NYNEX Corporation ("NYNEX") and Pacific Bell ("PacTel"), as amended November 4, 1993

Petitions to Impose Conditions or Alternatively to Deny

BellSouth Corporation, BellSouth Telecommunications, Inc., BellSouth Enterprises, Inc. ("BellSouth")

Southwestern Bell Corporation ("SW Bell")

Petitions to Deny

AD HOC IXCs, as supplemented November 9, 1993 and June 20, 1994

Cellular Marketing, Inc., Lawrence Communications Company, Car Telephones, Inc., and Key Cellular, Inc., (Collectively the "HCTC Agents")

National Cellular Resellers Association ("NCRA"), as amended November 2, 1993

Comments

Allnet Communications Services, Inc. ("Allnet")

Ameritech

People of the State of California and the Public Utilities Commission of the State of California ("California PUC")

Comsat Mobile Communications ("Comsat")

MCI Telecommunications Corporation ("MCI")

Kenneth Robinson

Opposition to Petitions to Deny and Replies to Comments

AMSC Subsidiary Corporation ("AMSC")

American Telephone and Telegraph Company ("AT&T") and McCaw Cellular Communications, Inc. ("McCaw")

Comsat

U S West, Inc. ("U S West")

Vanguard Cellular Systems, Inc. ("Vanguard")

Replies to AT&T's and McCaw's Opposition to Petitions to Deny

AD HOC IXCs

Ameritech

Bell Atlantic

BellSouth

Comsat

HCTC Agents (untimely filed January 21, 1994)

NYNEX and PacTel

SW Bell

Other Filings

National Association of the Black Owned Broadcasters ("NABOB"), informal objection (filed December 2, 1993)

AT&T and McCaw reply re NABOB's informal objection, filed January 18, 1994

Maxcell Telecom Plus, Inc. ("Maxcell") and TPI Enterprises, Inc. ("TPI"), informal objection (filed December 14, 1993)

BellSouth letter, filed March 14, 1994

AT&T and McCaw Response to BellSouth letter, filed March 30, 1994

Comments of State of California upon Competitive Effects of Proposed Merger within Particular Product and Geographic Markets, received June 20, 1994

AT&T and McCaw letter, filed July 20, 1994

Letter from Michael Kellogg, filed July 26, 1994, responding to July 20, 1994 AT&T and McCaw letter

Letter from L. Andrew Tollin, filed July 28, 1994, responding to July 20, 1994 AT&T and McCaw

Letter from L. Andrew Tollin to Honorable Reed E. Hundt, filed July 28, 1994

Letter from R. Michael Senkowski and David W. Carpenter to William Caton, filed August 1, 1994.

Letter from L. Andrew Tollin to William F. Caton, filed August 11, 1994

Letter from Michael Deuel Sullivan to William F. Caton, filed August 12, 1994

Request for Disclosure and Additional Briefing filed by Bell Atlantic on August 12, 1994

Applicants' Opposition to Bell Atlantic's Request for Disclosure and Additional Briefing filed August 15, 1994

Supplemental Pleadings re Documents Filed with Justice Department Pursuant to Hart-Scott-Rodino Act's Pre-Merger Review Process

Further Comments timely filed under seal by BellSouth on June 20, 1994

Comments timely filed under seal by Bell Atlantic Companies, NYNEX, PacTel and SW Bell on June 20, 1994

"Supplement to Petition to Deny" filed by the Ad Hoc IXCs on June 20, 1994 (attaching certain documents under seal)

AT&T and McCaw's Response filed under seal on July 1, 1994

Supplemental Comments filed under seal by Bell Atlantic, NYNEX, PacTel and SW Bell on July 15, 1994

FCC 94-261

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	CC Docket No. 92-166
to Establish Rules and Policies Pertaining	)	
to a Mobile Satellite Service in the	)	
1610-1626.5/2483.5-2500 MHz	)	
Frequency Bands	)	

REPORT AND ORDER

Adopted: October 13, 1994 Released: October 14, 1994

By the Commission:

TABLE OF CONTENTS

Topic	Paragraph No.
I. Introduction	1 - 5
II. Background	6 - 10
III. Discussion	
A. Licensing Procedures	
1. Qualification Requirements	11
a. Technical Qualifications	
i. Orbit Considerations	12 - 20
ii. Global vs. Regional Coverage	21 - 23
iii. Continuous Coverage of the Fifty States	24 - 25
b. Financial Qualifications	26 - 42
2. Spectrum Sharing Plan	
a. Background	43
b. The Basic Plan	44 - 46
c. Downlink Assignment	47 - 48
d. Interim Plan	49 - 53
e. Conditions to the Plan	
i. Reduction of Spectrum for Single CDMA System	54 - 55
ii. Other Potential Scenarios	56 - 57

f. System Amendments . . . . . 58 - 59
g. Inter-System Coordination . . . . . 60 - 63
3. Plan if Mutual Exclusivity is not Resolved 64
a. Comparative Hearing . . . . . 65 - 66
b. Lottery . . . . . 67 - 68
c. Competitive Bidding . . . . . 69 - 87
d. Competitive Bidding Procedure . . . . . 88 - 97
B. Interservice Sharing . . . . . 98 - 99
1. Radio Astronomy Service 100
a. In-band interference to the RAS . . . . . 101 - 109
b. Out-of-band interference to RAS from primary MSS uplinks at 1.6 GHz . . . . . 110 - 113
c. Out-of-band interference to RAS from secondary downlinks in the 1.6 GHz band . . . . . 114 - 119
d. Spurious emissions into the 4990-5000 MHz from primary downlinks in the 2483.5-2500 MHz band . . . . . 120 - 121
2. Aeronautical Radionavigation Satellite Service (GPS/GLONASS) 122
a. In-band interference to ARNS in the 1610-1626.5 MHz band from MSS primary uplinks in the 1610-1626.5 MHz band . . . . . 123 - 129
b. Out-of-band interference to ARNS/RNSS in the 1559-1610 MHz band . . . . . 130 - 137
c. Out-of-band interference to ARNS/RNSS from secondary MSS downlinks in the 1613.8-1526.5 MHz band . . 138 - 141
3. Industrial, Scientific, and Medical emissions at 2400-2500 MHz 142 - 144
4. Sharing with other Fixed Services in the 2483.5-2500 MHz band 145 - 151
5. Fixed Services above 2500 MHz (ITFS/MMDS) . . . . . 152 - 158
6. Other Terrestrial Services Outside of the United States . . . . . 159 - 162
C. Feeder Links . . . . . 163 - 169
D. Intersatellite Links 170
E. Service Rules
1. Regulatory Treatment . . . . . 171 - 181
2. System License and License Term . . . . . 182 - 187
3. Implementation Milestones . . . . . 188 - 193
4. Reporting Requirements . . . . . 194 - 195
5. Distress and Safety Communications . . . . . 196 - 202
6. Other Requirements . . . . . 203 - 207
F. Mobile Earth Station Licensing . . . . . 208 - 209
G. International Issues
1. Coordination . . . . . 210 - 213
2. EC Concerns . . . . . 214 - 224
IV. Final Regulatory Flexibility Analysis . . . . . 225 - 227
V. Conclusion and Ordering Clauses . . . . . 228 - 230

Appendix A
Appendix B

I. INTRODUCTION

1. By this Report and Order, the Commission takes the next step in the process of licensing the world's first commercial low-Earth orbit (LEO) satellites capable of providing both voice and data mobile satellite services (MSS) on a global basis. The satellites are to operate in the 1610-1626.5/2483.5-2500 MHz bands that were recently allocated both internationally and domestically to MSS.[1] This new mobile satellite service -- the "MSS Above 1 GHz" or "Big LEO" satellite service -- has the potential to provide not only a variety of new services to users in the United States, but to provide integrated communication services to all parts of the world, including those that are now grossly underserved. In a Notice of Proposed Rulemaking (Notice), adopted in January 1994,[2] the Commission proposed rules and policies to govern the service. Thirty-three parties filed comments in response to the Notice and 18 parties filed reply comments.[3] Since the pleading cycle closed, four of the applicants filed a Joint Proposal and Supplemental Comments (Joint Proposal).[4] A fifth applicant sent a letter to the Chairman (FCC) on September 14, 1994 regarding the Joint Proposal.[5] In this Report and Order, we adopt many of the proposals in the Notice, adopt others with modifications, and defer action on several issues where a decision is premature. We also adopt many, but not all, of the terms of the Joint Proposal. We believe our decision will promote participation by the greatest number of applicants in an expeditious time frame.[6] It will create a new industry providing enormous economic benefit to the United States, and any other country that chooses to participate in the service.

2. All six applicants who filed applications by the cut-off date, as detailed below, will be provided with an opportunity to file amended applications that conform with the rules adopted today. Given the importance of proceeding quickly with licensing systems in this revolutionary service, amended applications must be filed by November 16, 1994 in order to receive continued consideration. As is our usual practice in the satellite area, each applicant must request construction, launch and operating authority to retain its status in this processing group. All

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[1] International Telecommunication Union, Final Acts of the World Administrative Radio Conference (WARC-92), Malaga-Torremolinos (1992); Report and Order, ET Docket No. 92-28, 9 FCC Rcd 536 (1994) (Allocation Order).

[2] Amendment of the Commission's Rules to Establish Rules and Policies Pertaining to a Mobile Satellite Service in the 1610-1626.5/2483.5-2500 MHz Frequency Bands, 9 FCC 2d 1094 (1994).

[3] A list of commenters is attached as Appendix A.

[4] See note 23, infra.

[5] See note 23, infra.

[6] See S.R. 103-309 (July 14, 1994).

amendments must be accompanied by the appropriate fee for applications for launch and operating authority for LEO satellite systems, if that fee has not yet been submitted. Applicants will be provided until January 31, 1996, at their option, in which to make a complete financial showing.[7]

3. As described in the Notice, the Big LEO service can offer an almost limitless number of services, including ubiquitous voice and data mobile services, position location services, search and rescue communications, disaster management communications, environmental monitoring, paging services, facsimile transmission services, cargo tracking, and industrial monitoring and control.[8] Domestically, this service will help meet the demand for a seamless, nationwide and eventually global communications system that is available to all and that can offer a wide range of voice and data telecommunication services. In addition to enhancing the competitive market for mobile telecommunication services in areas served by terrestrial mobile services, this new mobile satellite service will offer Americans in rural areas that are not otherwise linked to the communications infrastructure immediate access to a feature-rich communications network. Moreover, Big LEO systems can extend these benefits throughout the world, and can provide those countries that have not been able to develop a nationwide communication service an "instant" global and national telecommunication infrastructure.[9] This network can be used to provide both basic and emergency communications to their entire populations. Big LEO systems may prove to be a critical component in the development of the global information highway.

4. The Big LEO service also has the potential to stimulate significant economic growth both in the United States and abroad. A potential multi-billion dollar industry will be created, generating opportunities for economic growth in a variety of markets. First, the estimated costs to construct the applicants' space segments range from $97 million to over $2 billion each. The manufacturing costs for the ground segment, which include both user units and gateway stations, are expected to be hundreds of millions of dollars more. Thus, manufacturing these systems may lead to a substantial investment in the United States economy and create a significant number of high paying jobs in the areas of research and development, production, marketing and service administration. As the services become available, additional growth opportunities will be created. One of the applicants, for example, expects that by 2001 the demand for user transceivers will be 1.3 million in the United States and 4.7 million worldwide.[10] If so, this will create a major global industry whose function will be to provide users with mobile units and services. As demand grows and as markets develop, additional

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[7] See para. 40, infra.

[8] See paras. 196-202, infra, regarding the use of Big LEO systems for emergency communications.

[9] It is estimated that some of these services will cost as little as 22 cents per minute.

[10] Application of Motorola Satellite Communications, Inc. at 11.

employment opportunities will be created. Customer purchases of transceivers and user service charges will generate additional investment in the economies of the host countries. Finally, the enhanced communications services offered by this industry will, of themselves, create a broad secondary economic growth. Immediate access to an advanced global communications infrastructure can increase the efficiency of existing businesses and create new ones.

5. The United States has led the world in developing and implementing satellite technology. We expect many of the economic, cultural and other gains we have seen in the fixed-satellite industry to be reflected in the new mobile satellite industry. The Big LEO proposals before us represent an opportunity for the United States to continue its leadership role in promoting global development through enhanced communication infrastructures and services. We intend to license these systems as quickly as possible so that this opportunity is not lost.

II. BACKGROUND

6. As described in the Notice,[11] this proceeding was initiated in late 1990, when Ellipsat Corporation (Ellipsat)[12] and Motorola Satellite Communications, Inc. (Motorola) filed applications to construct LEO satellite systems in the 1610-1626.5/2483.5-2500 MHz bands and the 1610-1626.5 MHz band, respectively.[13] At the time these applications were filed, there was no frequency allocation in these bands for MSS. The bands were allocated to, among other services, the radiodetermination satellite service (RDSS), which encompasses satellite radionavigation and radiolocation services.[14] The Motorola and Ellipsat systems were intended to provide voice and data MSS in addition to RDSS. Both applicants requested waivers of the

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[11] See Notice, note 2, supra, at paras. 5-9.

[12] Ellipsat is now doing business as Mobile Communications Holdings, Inc. Because it has participated throughout this proceeding as Ellipsat, we will continue to refer to it as Ellipsat in this Report and Order.

[13] Ellipsat proposed the 1.6 GHz band for Earth-to-space transmissions and the 2.4 GHz band for space-to-Earth transmissions. Motorola proposed to use the 1.6 GHz band for bidirectional transmissions. Motorola later modified its application to request the 1616-1626.5 MHz band only. See Minor Amendment filed by Motorola (Aug. 14, 1992).

[14] Portions of the bands are also allocated to the aeronautical radionavigation service (ARNS), the radioastronomy service, the terrestrial fixed-service and for use by industrial, scientific, and medical equipment. See paras. 98-162, infra, for a complete discussion of sharing between MSS and other allocated services.

U.S. Table of Frequency Allocations, 47 C.F.R. § 2.1, to permit non-conforming MSS operations in the bands.[15]

7. The Commission placed the Ellipsat and Motorola proposals on public notice and established a June 3, 1991 cut-off date for filing applications to be considered concurrently with them.[16] In response, Constellation Communications, Inc. (Constellation), Loral Cellular Systems Corp., now doing business as Loral Qualcomm Partnership (LQP), TRW, Inc. (TRW), and AMSC Subsidiary Corporation (AMSC) filed applications. Constellation, LQP, and TRW proposed to construct LEO satellite systems. AMSC proposed to add additional frequencies onto its authorized geostationary satellite-orbit (GSO) system.[17] The LEO applicants proposed two basic LEO system architectures. TRW, LQP, Ellipsat, and Constellation proposed a code division multiple access (CDMA) architecture. CDMA systems can share the same frequencies when operating under certain technical constraints.[18] Motorola proposed a time division multiple access/frequency division multiple access (TDMA/FDMA) architecture. TDMA/FDMA systems must operate on separate dedicated frequencies.[19] AMSC's proposed GSO system could use either CDMA or narrowband FDMA techniques.

8. The World Administrative Radio Conference (WARC-92), allocated frequencies for MSS in February 1992.[20] Specifically, the 1610-1626.5 MHz band was allocated on a co-primary basis with other radio services for MSS Earth-to-space operations and the 2483.5-2500

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[15] These waiver requests have become moot in light of the subsequent domestic and international MSS allocation in these bands. See note 1, supra.

[16] Public Notice, Report No. DS-1068, 6 FCC Rcd 2083 (1991).

[17] AMSC requested authority to modify its authorized upper L-band (1545-1559/1646.5-1660.5 MHz) MSS system to include the 1616.5-1626.5 MHz frequency bands.

[18] Spread spectrum CDMA is a digital transmission technique in which the signal occupies a bandwidth larger than that needed to contain the information being transmitted. Because the signal is spread over a wide bandwidth, the power is dispersed and interference potential is reduced. The spreading is accomplished by modulating the signal by a code that is independent of the information data. A synchronized code in the receiver is used to de-spread the signal and recover the information. The spreading and the variation in the code permit a number of users to operate on the same frequency simultaneously without causing harmful interference.

[19] TDMA is a transmission technique in which the same frequency band is used by both uplink and downlink transmissions in alternating time slots. FDMA provides multiple discrete channels with different center frequencies.

[20] See note 1, supra.

MHz band was allocated on a co-primary basis for space-to-Earth operations.[21] In addition, a secondary allocation was made for MSS space-to-Earth operations in the 1613.8-1626.5 MHz segment of the 1.6 GHz band. Shortly thereafter, the Commission proposed an identical domestic allocation and subsequently adopted that allocation in December 1993.[22]

9. The Commission conducted a negotiated rulemaking from January through April 1993 to assist it in developing technical rules for the MSS Above 1 GHz service. The Negotiated Rulemaking Committee's (the Committee's) work included technical matters relating to compatibility among the proposed MSS systems (inter-system sharing issues), compatibility between MSS and other services in the band or in adjacent bands (inter-service sharing issues), and the operations of MSS feeder links and intersatellite links. The Committee reached consensus on many issues, but did not reach a consensus regarding a technical method by which all proposed systems could be accommodated within the 1610-1626.5/2483.5-2500 MHz bands.[23]

10. In January 1994, the FCC adopted the Notice proposing, among other things, a LEO design requirement, a requirement that systems be capable of serving all areas of the world (except for the polar regions) for at least 75% of each day, a requirement that systems be capable of serving all areas of the United States at all times, and a requirement that applicants demonstrate sufficient current assets or irrevocably committed financing to meet construction and launch costs for the entire system. We also proposed a spectrum sharing plan that could accommodate up to five systems. We indicated that if mutual exclusivity could not be resolved, we would consider awarding licenses by auction, lottery or comparative hearing.[24]

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[21] "Primary" services have equal rights to operate in particular frequencies. Stations operating in primary services are protected against interference from stations of "secondary" services. Moreover, stations operating in a secondary service cannot claim protection from harmful interference from stations of a primary service. See 47 C.F.R. §§ 2.104(d) and 2.105(c).

[22] See note 1, supra.

[23] See Report of the MSS Above 1 GHz Negotiated Rulemaking Committee (Apr. 6, 1993). The Committee included two independent attachments discussing this issue in the Report. One was supported by AMSC, Celsat, Inc., Constellation, Ellipsat, LQP and TRW. The other was supported by Motorola. Since the end of the Negotiated Rulemaking, the LEO applicants have submitted several partial settlement proposals. See Joint Filed Comments, submitted by Motorola and LQP (Oct. 7, 1993); Joint Spectrum Sharing Proposal, submitted by Constellation, Ellipsat and TRW (Oct. 8, 1993). Joint Proposal and Supplemental Comments submitted by Constellation, Ellipsat, Motorola, and TRW (Sept. 9, 1994). See also letter from LQP to FCC (Sept. 13, 1994).

[24] Notice, note 2, supra, at paras. 29-47.

III. DISCUSSION

A. Licensing Procedures

1. Qualification Requirements

11. As discussed in the Notice, unless otherwise proscribed by rule, statute or treaty, the Commission has traditionally adopted qualification requirements for each satellite service that reflect the nature of and entry opportunities for the particular service being licensed. Where entry opportunities for a particular service are limited, our threshold qualification requirements for that service are designed to ensure that those awarded licenses can expeditiously implement state-of-the-art systems that further the public interest. If applicants are unable to meet the basic qualifying criteria, their applications are dismissed without additional hearing.

a. Technical Qualifications

i. Orbit Considerations

12. In the Notice, we proposed to require MSS Above 1 GHz systems to operate in non-geostationary orbits.[25] Because of their lower altitude orbits, LEO systems "can shorten the transmission time between two earth stations, serving to reduce or eliminate the time delay that may now be present in [GSO] satellite-delivered telephone service."[26] We also stated that the Communications Act specifically requires us "to encourage the provision of new technologies and services to the public."[27] We noted that LEO satellite systems, which cover higher latitudes than GSO satellites, and provide a variety of low power links to and from terrestrial equipment, represent such a new technology. We also noted that the inherently global nature of LEO systems offers a broad range of public interest benefits for the United States, including increased possibilities of U.S. leadership in developing and implementing satellite technology, and enhanced U.S. global competitiveness in telecommunication. We suggested that the unique features of LEO systems would foster social and economic benefits throughout the world.

13. We requested comment on the potential for MSS Above 1 GHz systems to generate social, economic, and technical benefits, both domestically and globally, and the extent to which these benefits are realizable with LEO and GSO satellites. We also asked applicants to specify the extent to which their proposed systems will foster these goals and the manner in which their services are planned to be offered. Prospective customers were asked to specify their anticipated use or uses of MSS Above 1 GHz systems, including a discussion of whether

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[25] Id. at paras. 20-22; proposed § 25.143(b)(1).

[26] Id. at para. 22.

[27] 47 U.S.C. § 157.

equivalent services can be provided by LEO and GSO facilities and whether, and the extent to which, alternative terrestrial services are available.

14. AirTouch Communications (AirTouch), Constellation, Ellipsat, LQP, Motorola, Novacom Inc. (Novacom), and TRW support our proposal to require MSS Above 1 GHz systems to operate in LEO orbits. The range of technical benefits to the United States and world communities by LEO systems includes virtually instantaneous voice transmissions, broader geographic coverage, use of low power handheld transceivers and small antennas. AMSC, Comsat, Mobile Communications (Comsat), Mobile Datacom Corporation (Mobile Datacom), and Newcomb Communications, Inc. (Newcomb) do not support our proposal. They argue that there will be no significant qualitative or quantitative difference in the time delay experienced by users of GSO and non-GSO systems and that GSO systems are capable of providing services to most of the Earth. They further argue that LEO technology is subject to shadowing outages,[28] is more complex , and is unproven.

15. We adopt our proposed LEO design requirement. First, AMSC has not convinced us that our assumption regarding the time delay in high altitude GSO systems was in error. While system processing times associated with non-GSO satellite handoffs may be marginally longer than the 18 milliseconds noted by LQP, AMSC has not shown that a GSO system's typical voice transmission delay of some 250 milliseconds, or even longer for multiple hops, is not noticeable to users.

16. Further, LEO systems are significantly superior in their coverage capabilities. While GSO systems can provide coverage to most of the world, this coverage is limited in areas of high latitude, including parts of Alaska. AMSC concedes that GSO systems can provide only "near" total coverage of the Earth. Although GSO systems are capable of providing acceptable services across most of the Earth's surface, LEOs are capable of providing truly global coverage. LEO technology, for example, may enable residents of remote parts of Alaska to have individual telephone access for the first time. There is nothing in the record to suggest that provision of such broad geographical service reduces the capacity of LEO systems to serve more concentrated areas, as AMSC suggests. The public interest would be best served by the technology that offers the broadest potential coverage.

17. The use of handheld transceivers also is facilitated by LEO systems. LEO satellites' lower power levels alleviate the need for large antennas aboard the spacecraft and reduce transceiver weight and volume, enhancing their portability. By contrast, AMSC suggests that handheld transceivers are not contemplated by GSO systems.[29] Its immediate plans do not

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[28] Shadowing occurs when transmissions from the satellite or mobile transceivers are blocked by buildings and vegetation. Shadowing also occurs to GSO systems when the user transceiver terminal is located on a vehicle.

[29] AMSC Reply Comments at 3, n. 1.

include handheld capability, though its second generation system is expected to support them. [30] As we embark on the promise of new mobile technologies, we find it in the public interest to permit the timely deployment of personal communications services that include the broad use of handheld transceivers.

18. One risk cited by AMSC is the increased possibility that the satellites in the LEO constellation will collide with other objects in space. We do not view this as stifling LEO technology. Both the likelihood of collisions and future mitigation methods are being discussed in domestic and international fora. However, the record in this proceeding does not support a finding that space collisions will become a significant problem for LEO systems. We also acknowledge that the reception shadowing associated with LEO satellite movement relative to the Earth's surface (which AMSC suggests would adversely affect signal quality during voice communications) may add to the operational challenges confronting LEO MSS technology. There is no showing, however, that shadowing is more of a problem with LEO technology than it is with GSO technology.

19. Advocates of both GSO and LEO systems argue that their technology will offer economic and social benefits, domestically and globally. The essential advantage of GSO systems is their proven capability to provide telecommunication services. Intelsat and Inmarsat are but two examples. These successes, however, are not sufficient to preclude embracing a new and potentially more efficient technology, notwithstanding its substantial risks and costs. On the contrary, the Commission has a mandate to encourage new technologies and services.[31] While both LEO and GSO systems portend substantial opportunities for employment growth and export of U.S. technologies worldwide, LEO systems have greater potential to serve more uniformly the United States and international locations with smaller, more ubiquitous and lower power equipment. This leads us to conclude that the primary use of the subject spectrum should be by LEO systems. We therefore adopt Section 25.143(b)(2)(i) as proposed in the Notice.

20. Most commenters agree that it would it be difficult for GSO and LEO systems to operate MSS services together in this band. Indeed, this was a significant factor in our decision to propose limiting the 1610-1626.5/2483.5-2500 MHz band to LEO systems. Notwithstanding our decision to adopt a LEO design requirement, we would consider authorizing a GSO system in these bands upon a showing that its operations would not cause interference to or affect LEO operations. Similarly, the provision of radiodetermination satellite services (RDSS) by either LEO or GSO systems would be permissible if fully compatible with licensed LEO MSS systems.[32]

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[30] Id.

[31] 47 U.S.C. § 157.

[32] See 47 C.F.R. § 25.141(f).

ii. Global vs. Regional Coverage

21. In our Notice, we discussed the geographic coverage we would require these satellite systems to provide. In view of our interest in furthering the creation of the global information infrastructure, we proposed to require each MSS Above 1 GHz applicant to demonstrate that its proposed system is capable of providing mobile satellite service to all areas of the world, with the exception of the polar regions, for at least 75% of every 24 hour period. Specifically, we proposed that Big LEO satellite systems be designed so that at least one satellite would be visible above the horizon at an elevation angle of at least 5° for at least 18 hours each day at latitudes less than 80°.[33]

22. The commenters generally support this requirement. They disagree, however, on the extent to which systems must offer service in or near the polar regions. The majority, including the system applicants, agree that there is little need for a requirement to serve unpopulated areas. They argue that the additional costs associated with such service would not be justified. For example, TRW suggests that service up to 80° northern and southern latitudes may not be necessary, because there are no populated areas that far north or south and the economic costs of requiring such service are high. Ellipsat favors requirements of 55° Southern Latitude and 75° degrees Northern Latitude, to cover all but the most remote population centers. The parties to the Joint Proposal modify their previous positions by suggesting a coverage requirement of up to 70° North Latitude and 55° South Latitude.

23. As noted, LEO systems are capable of providing service to all points on Earth. We recognize, however, the need to balance system cost against geographical service area. We agree with the commenters that it is sufficient, given projected need and alternative service options, to require service only to populated areas. We therefore require that Big LEO systems be capable of serving locations as far north as 70° latitude and as far south as 55° latitude. This will allow coverage to populated areas that cannot be reached by GSO systems. While ships and airplanes may traverse the polar regions beyond these latitudes, they are not necessarily deprived of service because the LEO satellites may, in fact, be visible.

iii. Continuous Coverage of the Fifty States

24. We indicated in the Notice that the public interest would be served if LEO systems provided efficient and ubiquitous voice service to users throughout the United States. We therefore proposed to require each LEO system to have at least one satellite at an elevation angle of at least 5° at any given time in all areas of the United States.[34]

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[33] See Notice, note 2, supra, App. A at 1152; proposed Section 25.143(b)(2)(ii).

[34] See id.; proposed Section 25.143(b)(2)(iii).

25. Several commenters note that we proposed to require global "mobile satellite services" in proposed Section 25.143(b)(2)(ii) and domestic "voice" service in proposed Section 25.143(b)(2)(iii). Our expectation is that LEO system operators will have market incentives to offer more than merely voice services, but for purposes of consistency we will revise proposed Section 25.143(b)(2)(iii) to read "mobile satellite services." Further, in the Joint Proposal, the parties agree that Big LEO systems should be capable of covering all fifty states, Puerto Rico and the U.S. Virgin Islands. We will amend Section 25.143(b)(2)(iii) to reflect this coverage.

b. Financial Qualifications

26. In light of the enormous costs involved in constructing and launching a satellite system, we have always considered financial ability a significant factor in determining whether an applicant is qualified to hold a license. Historically, the Commission has fashioned financial requirements for satellite services on the basis of entry opportunities in the particular service being licensed. This stems from our repeated experience that licensees without sufficient available resources spend a significant amount of time attempting to raise the necessary financing and that those attempts often end unsuccessfully.[35] Consequently, where a grant to an under-financed applicant may preclude a fully capitalized applicant from implementing its plans, and service to the public may be consequently delayed, we have required a stringent financial showing to ensure that the public interest would be served.[36] We have required a less stringent financial showing where grant to an under-financed applicant will not prevent another from going forward. For example, we required only a detailed business plan in the radiodetermination satellite service, where all applicants could be accommodated and future entry was possible.[37] In contrast, we required evidence of full, irrevocable financing in the domestic-fixed satellite

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[35] See, e.g., National Exchange Satellite, Inc., 7 FCC Rcd 1990 (Com. Car. Bur. 1992); Rainbow Satellite, Inc., Mimeo No. 2584 (Com. Car. Bur., released Feb. 14, 1985); United States Satellite Systems, Inc., Mimeo No. 2583 (Com. Car. Bur., released Feb. 14, 1985) (domestic satellite licenses declared null and void for failure to begin implementation as required by license). In addition, Geostar Corporation, a start-up company licensed in the radiodetermination satellite service, declared bankruptcy nearly five years after its licenses were issued. It had not built any of its satellites.

[36] This approach has not prevented smaller firms from participating in the satellite services market because ownership of a space station is not mandatory. Space station capacity can be leased or bought, and earth stations can be acquired at relatively low costs.

[37] Amendment of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to, a Radiodetermination Satellite Service, 104 FCC 2d 650 (1986) (RDSS Licensing Order). We note that none of the four entities awarded licenses implemented their proposed systems, with the last remaining licensee, Geostar Corporation, declaring bankruptcy in 1991.

service, where applications to implement space stations regularly exceed the number of available orbital locations for those satellites.[38]

27. The Negotiated Rulemaking Committee could not agree to a method by which all six proposed systems could be licensed. Further, the sharing plan we proposed in the Notice, and which we adopt today,[39] does not accommodate all pending applicants and leaves little or no spectrum available for expansion of existing systems or the development of future MSS systems within the United States. Consequently, consistent with our past practice, we seek to ensure that those applicants awarded Big LEO licenses have the financial ability to proceed.

28. The domestic fixed-satellite standard was developed to serve the public interest by deterring warehousing and inefficient use of valuable orbit spectrum resources. Given the same public interest concerns here, we proposed in the Notice a financial standard for the Big LEO service identical to the one used in the domestic fixed-satellite service, noting that a lesser standard could allow permittees to tie up scarce spectrum resources while preventing other qualified entities from providing service to the public.[40] Thus, we proposed to require Big LEO applicants to provide evidence of current assets, operating revenues, or irrevocably committed debt or equity financing sufficient to meet the estimated costs of constructing and launching all planned satellites, and operating the system for the first year.[41]

29. The four parties to the Joint Proposal suggest using a less stringent financial standard that requires an applicant to show "financial preparedness, including reliance on projected revenues and future public offerings" in order to be granted a construction permit. Within one year from the date of the grant of a license, each permittee would be required to demonstrate that it meets the domestic fixed-satellite service financial standard with respect to 25% of the total constellation construction and launch costs. LQP, in contrast, argues that this proposed relaxation of financial standards must be balanced against the concern that only viable applicants be licensed.[42]

30. We conclude that although more relaxed approaches may be used for some satellite services, a strict financial requirement is warranted for the Big LEO service. The proposed Big

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[38] Licensing Space Stations in the Domestic-Fixed Satellite Service, 50 Fed. Reg. 36071 (Sept. 5, 1985) (1985 Processing Order).

[39] See paras. 44-45, infra.

[40] 1985 Processing Order, note 38, supra, at para. 8.

[41] Notice, note 2, supra, at para. 27. We noted that "first year operational costs" were to be calculated for the year following the launch of the first satellite in the constellation.

[42] See Letter from Chairman, Loral Corporation to Christopher B. Galvin, Motorola, Inc. (Sept. 13, 1994).

LEO systems will cost between $97 million and $2 billion to implement. These are, by far, the most expensive satellite systems to date. As we indicated in the Notice, our experience with the satellite industry has proven that arranging financing for any space station system, even one significantly less costly than a Big LEO system, is extremely difficult, even after a construction permit has been granted.[43] Consequently, adopting a lesser financial standard than the domestic fixed-satellite standard, such as the one suggested in the Joint Proposal, could tie up spectrum for years, with contrary to the public interest. While system implementation milestone requirements[44] will provide a mechanism by which to revoke the licenses of those entities that are not capable of going forward, this process takes considerable time and can delay qualified entities from implementing systems and providing service to the public.[45] Because all pending Big LEO applicants cannot be accommodated and because there appears to be no room for future entry, granting an under-financed space station applicant a license may preclude an applicant that possesses the necessary financial resources from implementing its plans, and consequently service to the public may be delayed. Accordingly, we conclude that a financial demonstration identical to the one used in the domestic fixed-satellite service, as proposed in the Notice, should be adopted for the Big LEO service.

31. Applicants relying on internal financing need not set aside specific funds for their systems. Rather, as in the domestic fixed-satellite service, we require only a demonstration of current assets or operating income sufficient to cover system costs. The availability of internal funds sufficient to cover a system's costs provides adequate assurance at the time the Commission acts on the application that the system can be built and launched. Current assets -- which includes cash, inventory, and accounts receivable -- provide a general measure of a company's ability to finance the project itself or to raise funds from lenders and equity investors on the basis of its on-going operations. Highly capitalized companies possess more collateral and, thus, are in a better position to borrow money than thinly capitalized companies.

32. Further, "irrevocably" committed external financing is financing that has been approved and does not rest on contingencies which require action by either party to the loan or equity investment. In other words, the instrument of financing must demonstrate that the lender

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[43] See note 35, supra.

[44] See paras. 188-193, infra.

[45] For example, ABCI, Rainbow, and USSSI were granted domestic fixed-satellite licenses in early 1983. Those licenses were not declared null and void until two years later, shortly before action was taken on the next processing group of domsat applications. Applications in that particular processing group had been on file since late 1983 and action on that group was delayed, in part, by the ABCI, Rainbow, and USSSI proceedings. See, e.g., United States Satellite Systems, Inc., FCC 83-602 (released Jan. 23, 1984) (granting USSSI an additional six months in which to complete its financing), Mimeo No. 2583 (released Feb. 14, 1985) (revoking USSSI authorizations), FCC 85-394 (released Aug. 29, 1985) (denying USSSI's applications for review).

has already determined that the applicant is creditworthy and, absent a material change in circumstances, is prepared to make the loan immediately upon grant of a Commission authorization.[46] This is not to preclude applicants from relying on operating revenues from the initial operations of their systems to finance the remainder of their systems. Nevertheless, to ensure that the system is completed in a timely manner if revenues are not available as soon as anticipated, we require a commitment that a lender is prepared to finance the entire cost of the system.

33. Some of the applicants argued in their comments[47] that a more relaxed standard is supported by our use of a less stringent financial requirement in the radiodetermination satellite service (RDSS) and the non-voice, non-geostationary (NVNG) service. These parties argue that the unproven nature of the RDSS and NVNG services led to the adoption of a financial standard that permitted applicants to finance the systems as they are built and deployed, and that similar considerations apply in the Big LEO service. Our primary reason for the "relaxed" standard in the RDSS and NVNG services, however, was that all pending applicants could be accommodated and future entry was possible.[48] Consequently, a grant to an under-financed applicant would not preclude another qualified entity from going forward. The financial qualification standard adopted for RDSS and NVNG services is therefore inappropriate for Big LEOs.

34. Some of the applicants also argue that we should require only a demonstration of partial financing. They contend that applicants that have the financing to meet construction and launch costs for the number of satellites needed to provide limited domestic and global service will be able to finance the remainder of their systems with the operating income from these services. Such a position, however, would not promote the global availability of this service. A system that relies too heavily on operating income from its first satellites for its completion could easily become stalled before it is able to provide domestic or global service that meets our service requirements.[49] Any applicant that cannot demonstrate the capability to launch more than a limited number of satellites should not be considered for licensing at the expense of potential entrants that could provide global service and continuous domestic service.

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[46] For example, a change in general market conditions or in the applicant's creditworthiness is an acceptable limitation on the lender's commitment to make the loan. Further, a lender is not required to lend the applicant the entire sum at once. Rather, funding can be staggered to reflect the system's implementation schedule or the applicant's need to access those funds. See Licensing Space Stations in the Domestic-Satellite Service, 101 FCC 2d 223 (1985) (1985 Processing Group Notice of Proposed Rulemaking), at para. 22.

[47] We will address all concerns raised in the comments even though they may be inconsistent with the positions taken by the applicants in the Joint Proposal.

[48] See Notice, note 2, supra, at 1108; RDSS Licensing Order, note 37, supra; Report and Order in CC Docket No. 92-76, 8 FCC Rcd 8450 (1993) (NVNG MSS Order).

[49] See para. 29, supra.

35. Ellipsat comments that we should require applicants relying on internal funds to demonstrate a management "commitment" to expend those funds for the Big LEO project. Ellipsat argues that this requirement would put companies with greater capital assets on an even footing with smaller applicants who must rely on "irrevocable" outside loan commitments to establish their financial qualifications. As we stated in adopting the domestic-fixed satellite standard, we will not require management to set aside specific funds for the system. We will, however, require applicants relying on internal assets to provide a balance sheet demonstrating current assets or operating income sufficient to meet the space segment costs together with evidence of a management commitment to the project. This does not require an unalterable commitment that the funds will be expended regardless of market conditions. Rather, consistent with our approach to credit arrangements provided by outside sources, management of the corporation providing the funding must commit that absent a material change in circumstances, it is prepared to expend the necessary funds.[50] Those applicants relying on financing from parent corporations must make the same showing with respect to the parent corporation's commitment.

36. AMSC urges that, given the short life of LEO satellites, we should require the applicants to demonstrate the financial capability to build an entire constellation and a fleet of replacement satellites. Although some of the proposed systems use satellites with a short life, a requirement to demonstrate full funding for these before the first generation is built would be exceptionally onerous and unnecessary. We are confident that after constructing and operating a full fleet of satellites, a licensee would have ample incentive and resources to implement replacement satellites, unless there is insufficient demand. In that case, however, the public would not be harmed by discontinuation of the licensee's service.

37. We recognize that applicants may be able to provide the service requirements adopted today with fewer satellites than proposed in the pending applications. In such a case, an applicant has the option, of course, to modify its pending application to specify only those satellites necessary to meet our minimum requirements, and its financial and technical showing would need to cover only such a constellation. It could then apply to expand its constellation as originally envisioned, as it attains the financial capability to do so.

38. Consequently, to meet the public interest objective of ensuring prompt initiation of this new satellite service, we adopt our proposed rule that requires each Big Leo applicant to demonstrate the ability to build and launch all satellites for which it has applied, which includes those satellites necessary to fulfill our service requirements, and to operate its system for one year after launch of the first satellite in its constellation. In doing so, however, we shall modify our eligibility requirements somewhat in an effort to achieve greater participation by the applicants in this processing group.

39. First, consistent with our paramount objective of securing early implementation of these satellite services, we shall adopt a rule, consistent with our proposal in the Notice, that

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[50] See 1985 Processing Order, note 38, supra, at n. 26.

will enable applicants who can now demonstrate their financial qualifications to receive priority in obtaining license grants. Thus, any applicant who can submit a complete, amended application on or before November 16, 1994, and demonstrates financial capability under the standards set forth in the rule adopted in this proceeding, will be processed immediately. Assuming sufficient spectrum is available to award licenses to all such financially and otherwise qualified applicants, we will grant licenses to these applicants. Given the the national and other public interest benefits of ensuring the United States' global leadership in providing these important new satellite services, we also plan to process these applications on an expedited basis, with action anticipated by January 31, 1995. Making these grants promptly will enable such fully qualified applicants to begin immediately the time-consuming process of satellite construction, thereby significantly assisting in United States' efforts to complete the international coordination process and achieving our statutory and public interest objective of bringing new and innovative services to the public at the earliest possible time.

40. We also wish, however, to accord some processing priority to other applicants in this group who may need more time to establish their financial qualifications, and who have all devoted significant time, effort and resources towards establishing the Big LEO service both domestically, in the Negotiated Rulemaking, and internationally. For example, until feeder link frequencies can be assigned to a particular system, which will not likely occur until after the next World Radio Conference to be held in November 1995 (WRC-95), it may be difficult for some of these applicants to finalize financial arrangements for their systems. Consequently, in an effort to afford an additional opportunity for entry by such applicants, we will allow applicants who cannot meet our financial qualifications requirement at this time an additional period of time to establish their qualifications. Specifically, we will require these applicants to file amended applications by November 16, 1994 to ensure their continued consideration, but we will allow them until January 31, 1996 -- two months after the completion of WRC-95 -- to demonstrate compliance with the financial standard adopted today.

41. Under our two-tiered eligibility rule, applicants who make a decision to defer their financial showing until January, 1996, will not jeopardize their status in the current processing group. Specifically, new applications for Big LEO systems will not be considered until after action on the six pending applications is completed. Nevertheless, such applicants will not be accorded the same processing priority as those applicants who are willing and able to demonstrate their financial qualifications far sooner, by November 16, 1994, and whose expeditious grants will better enable us to achieve early and successful international coordination and implementation of this service. Because the spectrum sharing plan we adopt today accommodates up to five systems,[51] we also recognize that applicants choosing not to make a financial showing until January 1996, may find their applications are mutually exclusive situation. Nevertheless, we believe a very significant likelihood exists that our financial eligibility rule will result in more of these applicants obtaining grants and that, in the intervening time frame until January 1996, events may occur that avoid mutual exclusivity altogether.

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[51] See paras. 44-45, infra.

42. If it turns out that all six applicants are able to estabish their financial qualifications by the November 16, 1994 deadline for amended applications, or alternatively, that all six applicants defer their financial showings until January 1996 and all are then deemed financially qualified, we will implement the auction procedure described below, paras. 88-97, to award licences. If, however, some grants have been made prior to January 1996, and a mutually exclusive situation arises then, the auction procedure outlined below cannot be used. However, given the uncertainty that such a situation will ever arise, we will not at this time decide how to process any such remaing mutually exclusive applications. Presumably, however, such grants would be awarded through an auction mechanism that is appropriate in the circumstances. We have decided, however, to defer any final decision on that issue at this time.

2. Spectrum Sharing Plan

a. Background

43. - As we discussed in the Notice, the six applicants proposed two system designs (LEO and GSO) and two system architectures (CDMA and TDMA/FDMA). A CDMA architecture would permit multiple systems to share the same frequencies. A TDMA/FDMA architecture would operate bi-directionally in a portion of the 1.6 GHz band only and would require each system to operate on discrete frequency band segments. The Committee's work plan called for the Committee to develop rules that would maximize multiple entry and avoid or resolve mutual exclusivity among the six applications. The applicants, however, could not develop a set of technical parameters and sharing criteria that could accommodate all proposed systems. In the Notice, we proposed a sharing plan that could accommodate up to four CDMA systems and one TDMA/FDMA system.[52] The plan was based, in part, upon partial settlement proposals filed by two groups of LEO applicants after the Negotiated Rulemaking was concluded.[53] The plan proposed to assign licensees implementing CDMA systems in the United States to 11.35 MHz of shared bandwidth at 1610-1621.35 MHz. It proposed to assign a TDMA/FDMA system operating in the United States to 5.15 MHz of dedicated bandwidth at 1621.35-1626.5 MHz. If only one CDMA system is implemented, the plan proposed to adjust the domestic assignment for that system to 8.25 MHz at 1610-1618.25 MHz, leaving the freed 3.15 MHz of spectrum available for possible reassignment to the TDMA/FDMA licensee or for new entry. We also tentatively concluded that CDMA systems would be provided with equal amounts of downlink and uplink spectrum, unless CDMA system proponents could demonstrate an unequal assignment was warranted.

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[52] Our plan included both system architectures for two reasons: (1) the record did not support a finding that one architecture is superior to the other, and (2) the plan would permit up to five systems to be licensed, furthering our multiple entry policy.

[53] See note 23, supra.

b. The Basic Plan

44. All five applicants proposing LEO systems agree that our plan provides a basis for accommodating five LEO systems. None takes issue with the framework of the plan: up to four CDMA systems can share 11.35 MHz of bandwidth in the 1.6 GHz band and that one TDMA/FDMA system can operate over 5.15 MHz of dedicated bandwidth. Constellation, for example, states that 11.35 MHz can "support competitive CDMA systems operating in a sharing environment."[54] Motorola supports awarding a single TDMA/FDMA license in 5.15 MHz of bandwidth.[55] LQP, TRW, and Ellipsat all agree that both LEO transmission techniques can be accommodated, with CDMA systems operating on shared spectrum. Indeed, the four proponents of the Joint Proposal, supported by LQP, explicitly agree to an 11.35 MHz/5.15 MHz spectrum split.

45. Despite its general agreement that its system could be accommodated in 11.35 MHz of shared spectrum, Constellation contends in its comments that all five LEO applicants should be given equal options to use the spectrum. Specifically, it argues that adoption of rules requiring four LEO applicants share spectrum, while allowing the remaining applicant to have exclusive use of its own band segment or assigning prime spectrum to one applicant and impaired spectrum to another, would violate the doctrine enunciated in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) (Ashbacker). We do not agree that a rule requiring sharing by applicants proposing CDMA systems, and that permits other applicants to have exclusive spectrum, implicates Ashbacker. Such a rule is merely a reasonable exercise of our rulemaking authority, based upon the technical characteristics of the systems involved. We also note that the CDMA applicants agreed to a band sharing plan. Indeed, Constellation agrees that its system can be accommodated in a shared band. Consequently, we adopt the plan's basic framework.[56]

46. Despite their general support for the plan, all LEO applicants request some modifications or clarifications. The requests center around three issues: (1) what portion of the 2.4 GHz MSS downlink band will be available to the CDMA licensees; (2) whether MSS operations in the lower 6 MHz of the 1.6 MHz band will be impaired by GLONASS, the Russian Global Navigation Satellite System, and radioastronomy service (RAS) operations in that band; and (3) whether the 11.35 MHz CDMA assignment will be automatically reduced to 8.25 MHz should only one CDMA system become operational. We discuss these in turn.

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[54] Constellation Comments at 19.

[55] Motorola Comments at 47, n. 35.

[56] See Final Report of the Majority of the Active Participants of Informal Working Group 1 to Above 1 GHz Negotiated Rulemaking Committee, Annex 1 (Attachment 1 to Committee Report) and Joint Proposal, note 23, supra.

c. Downlink Assignment

47. In the Notice, we assumed that CDMA systems assigned to share the 1.6 GHz uplink spectrum would require a corresponding amount of 2.4 GHz downlink spectrum. We requested comment on this assumption. All CDMA operators strongly disagree, arguing in their comments and in the Joint Proposal that CDMA applicants should be allowed to share the entire 16.5 MHz of 2.4 GHz downlink spectrum allocated to MSS. They argue that the systems must operate over the entire bandwidth to achieve maximum capacity at minimum cost. According to the CDMA proponents, if the number of satellites transmitting in any segment of the 2.4 GHz band is minimized, the satellites' cost can be substantially reduced. They also argue that the 2.4 GHz band is already constrained by international and domestic power flux density (pfd) limits and other existing services, which limits the number of users that can be served, and that any limitations on bandwidth will further affect system capacity.

48. We are convinced that the entire 16.5 MHz of spectrum allocated domestically and internationally at 2483.5-2500 MHz should be assigned to Big LEO system downlinks in the United States. There is no compelling reason to restrict use of this band. Indeed, assignment of the entire band should provide operators with sufficient flexibility to coordinate their operations with other Big LEO systems in the band and to accommodate other users in the band or in adjacent bands with little or no corresponding loss of capacity. Consequently, we will provide CDMA operators with access to the entire allocated 2.4 GHz band. Moreover, only satellite systems using CDMA will be permitted in this band.

d. Interim Plan

49. As we discussed in the Notice, interference problems between MSS and certain proposed applications on GLONASS, the Russian Global Navigation Satellite System, will not permit co-frequency co-system coverage in the United States and internationally in the 1610-1616 MHz band. Specifically, if GLONASS is used in conjunction with the U.S. Global Positioning System (GPS) to provide aircraft precision approach and terminal communications, as contemplated by the Federal Aviation Administration (FAA), MSS would not be able to operate in the shared band because of the potential for MSS mobile terminal interference into GLONASS mobile receivers.[57] We indicated in the Notice that we had initiated inter-agency and

[57] The FAA and the International Civil Aviation Organization (ICAO) are investigating using the GLONASS and GPS systems in a joint Global Navigation Satellite System (GNSS) that can support the civil aviation community with the integrity that is required to provide for precision approach landings. The Russian Federation is now launching a second generation of GLONASS satellites, GLONASS-M, which is operating over 24 channels in the 1596.7-1620.6 MHz band. GLONASS-M has not been coordinated internationally. Approximately 40 administrations, including the United States, have submitted comments or objections to the ITU Radiocommunication Bureau with respect to GLONASS-M. However, the Russian Federation has been coordinating the GLONASS-M system and has indicated that it has resolved most of

international negotiations regarding the use of GLONASS and were encouraged that even if GLONASS were ultimately used to provide services incompatible with MSS, the GLONASS final frequency plan would be changed to bands below 1606 MHz only, making the 1610-1616 MHz band available for MSS operations.[58] We recognized, however, that a GLONASS transition to bands below 1606 MHz may not be completed when the first MSS satellites are launched in the late 1990's. In that case, we stated we would need to develop a transitional plan for MSS migration into the vacated 1610-1616 MHz band "with MSS licensees operating on less than the full amount of their assigned spectrum during the initial phases of their operation."[59]

50. The applicants agree in their Joint Proposal that if GLONASS is not moved in a timely manner, the Big LEO licensees should share the burden of any spectrum loss. They argue, however, that we need not develop a transitional plan now, but, rather, that we should allow the parties to negotiate and reach such an agreement in the event GLONASS compromises MSS operations. Both Motorola and LQP argue in their comments that an interim plan would impede MSS by suggesting to GLONASS equipment manufacturers and other countries that they need not plan for the change in GLONASS frequencies and may lead to the view that revision of the GLONASS frequency plan is optional.

51. Our ongoing discussions with other agencies and with the Russian Federation continue to clarify the GLONASS issue. While we are confident that GLONASS will be moved to bands below 1606 MHz, we do not know when a full transition will occur. At our most recent bilateral discussions, the Russian Federation suggested that a GLONASS migration may not begin until 1998 and may not be completed until 2005.[60] We do not know whether GLONASS operations, before a migration to the final frequency configuration, will affect MSS CDMA systems operating in the lower frequency portion of the 1.6 GHz band, domestically or internationally. This depends upon two related factors: (1) the extent to which domestic and international civil aeronautical agencies and organizations (such as ICAO) use GLONASS to

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the objections by these administrations.

[58] The Russian Federation has indicated a willingness to use channels 0-12 (1602-1608.75 MHz center frequency) commencing in 1998. A guardband of approximately 4 MHz would be required to protect GLONASS-M narrowband signals from ground-based Mobile Earth Station (MES) out-of-band radio frequency emissions on aviation GNSS receivers using GLONASS signals.

[59] Notice, note 2, supra, at n.59.

[60] The Russian Federation has indicated that it can operate on channels -7 to +6 after 2005 (1598 to 1605.375 MHz center frequency). It has also indicated that it would only use channels 5 and 6 as technical channels over the Russian Federation. When this is implemented, GLONASS's highest effective operational channel will be 1604.25 MHz center frequency. Allowing for a 4 MHz guard band, there will then be no restrictions on MSS in the 1.6 GHz band.

provide approach and terminal communications that are incompatible with MSS operations and (2) the extent to which out-of-band emission limitations may be needed for MSS transmissions.[61] Nevertheless, a portion of the 1.6 GHz MSS frequency band may not be available for first-generation domestic MSS operations. At this time, the most likely worst-case scenario is that the 1610-1612 MHz band segment assigned to CDMA systems in our sharing plan may not be available for initial operations in the United States.[62] This is based on the launch and operation schedules outlined in the various applications.

52. We agree with the applicants that the burden of the potential 2 MHz shortfall should be shared among all 1.6/2.4 GHz MSS licensees. We believe, however, that a transitional plan is warranted. Such a plan will allow system launch to begin without potential delay and without the uncertainty associated with allowing the licensees to attempt to devise an interim plan on an ad hoc basis, as the Joint Proposal suggests.[63] In adopting an interim plan, we emphasize that we remain optimistic that the plan will not need to be implemented. Indeed, as provided in the Joint Proposal, all Big LEO operators will be authorized to construct systems capable of operating across the entire band allocated for that system architecture, that is, 1610-1626.5 MHz for CDMA systems and 1616-1626.5 MHz for bi-directional FDMA/TDMA systems. Further, even if the transitional plan is implemented, MSS operators will be permitted to expand into the unused 1.6 GHz MSS frequencies immediately after the GLONASS migration is completed. We

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[61] RTCA, Inc., an advisory committee to the FAA, is studying out-of-band emissions from mobile earth stations among other potential interference sources to GNSS receivers. RTCA, Inc. has formed an Ad Hoc Interference Subgroup (AHIS) of Special Committee 159 (SC-159) on Global Positioning Systems. A special Joint Task Group on SATCOM/GNSS Interference is also studying the mutual problems of electromagnetic compatibility of AMSS and GPS/GLONASS equipment operating on the same platforms or on platforms located at very close distances, i.e., airport terminals. See para. 137, infra.

[62] We note that to the extent MSS systems are launched before 1998, the 1610-1616 MHz portion of the 1.6 GHz band segment might not be available if GLONASS is being used in the GNSS for aeronautical operations. In that case, licensees can begin to implement channels starting from the highest frequency range downwards in conformance with the interim plan. We believe that this should not present significant problems since it will occur at the earliest stages of operations. We also note that it is possible that the FAA will decide not to use GLONASS until it shifts its frequencies to its final configuration. It may be prohibitively expensive for airlines to develop and install equipment using interim standards capable of protecting equipment using GLONASS. In that event, we believe that it is likely that the Russian Federation will advance the date to shift GLONASS frequencies to channel 6 and below as early as possible. The most recent bilateral discussion with the Russian Federation provides for periodic review of this time table and the deployment of the MSS systems in order to resolve any interference.

[63] We will, however, entertain a request for modification of the interim plan if agreed to by all licensees.

believe that any necessary transition among LEO licensees can be completed within six months of that date.

53. Our interim plan is based upon the most recent system designs presented to us in the context of the Negotiated Rulemaking. Four of the CDMA applicants propose to build systems using narrowband 1.25 MHz transmission channels while one -- TRW -- proposes wider 5 MHz channels. If the entire 11.35 MHz assignment designated for CDMA systems were available, the narrowband licensees would be able to operate over 9 transmission channels, while the wider band operator would be able to operate over two. If MSS cannot be provided in the 1610-1612 MHz portion of the CDMA band segment because of GLONASS considerations, two narrowband channels would be lost and one wideband channel would be lost. Allowing CDMA licensees to shift frequencies by 1.25 MHz into the designated TDMA/FDMA band at 1621.35-1626.5 MHz would provide both narrowband and wideband CDMA licensees with access to one additional channel. Consequently, until the entire 1610-1626.5 MHz band is available for MSS operations, we will provide CDMA operators with the option of operating in the 1621.35-1622.60 MHz band segment. In this way, all Big LEO operators will bear some of the necessary operating constraints -- the narrowband CDMA operators by the net loss of one channel, the wideband CDMA operators by the loss of one channel or by the need to retune the center frequencies on both of its channels once GLONASS is fully moved,[64] and the FDMA/TDMA licensee by the loss of operating bandwidth. Nevertheless, we are optimistic that these measures will not be necessary or, if they are, that the effect on the MSS industry will not be significant given their short term nature and the anticipated incremental implementation of Big LEO service.

e. Conditions to the Plan

i. Reduction in Spectrum for Single CDMA System:

54. Another issue raised by the LEO applicants is our proposed modification to the plan in the event only one CDMA licensee goes forward.[65] In this unlikely scenario, we proposed to reduce the bandwidth assigned to that system automatically from 11.35 MHz to 8.25

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[64] The additional interim bandwidth of 1.25 MHz (1621.35-1622.60 MHz) would allow TRW to operate two 5 MHz CDMA channels at 1612.60 MHz to 1617.60 MHz and 1617.60 MHz to 1622.6 MHz. If it chooses to do this, it would be required to move these channels to 1610 to 1615 MHz and 1615 to 1620 MHz once GLONASS is moved. This would require the center frequencies on each channel to be shifted or retuned.

[65] Under the terms of each authorization, Big LEO licensees will be required to meet specified implementation milestones for the system. Failure to meet these deadlines will render the authorization null and void. See para. 189, infra. The bandwidth adjustment discussed here would be triggered only: (1) if no CDMA system is licensed; (2) if only one CDMA system is licensed; or, (3) if more than one CDMA system is licensed and all but one is declared null and void.

MHz. We stated that an 8.25 MHz assignment, or one-half of the available 1.6 GHz MSS allocation, should be sufficient to support a viable system. We noted that the remaining 3.1 MHz of spectrum would be made available to an operational FDMA/TDMA system upon a showing of need or, if this demonstration could not be made, to a new entrant. The four parties to the Joint Proposal suggest that if one CDMA and one FDMA/TDMA system become operational, the 3.1 MHz of spectrum should be available to both of these licensees upon a showing of need and should not be made available to new entrants. In their comments, the CDMA operators argued that an automatic spectrum reduction for a CDMA system with no possibility of adjustment would penalize a CDMA licensee for the failure of another operator to launch a system, that it does not consider the efficiency of the system or whether the CDMA system is sharing spectrum with a foreign system, that it does not give CDMA operators a corresponding opportunity to gain access to bands above 1621.35 MHz upon failure or inefficient spectrum use by the FDMA/TDMA licensee, and that it will seriously impair CDMA operations. They further argued that even if GLONASS is moved, the lower frequency portion of the band is subject to more interservice sharing constraints because of protected radio astronomy operations.

55. The CDMA proponents correctly state that uncertainties are present in the lower portion of the band that are not present in the upper portion. As noted, GLONASS is now operating in 1610-1616 MHz band and we do not know exactly when it will be moved or the limitations its operations will impose on MSS operations. Further, the radioastronomy service (RAS) operates on a co-primary basis in the 1610.6-1613.8 MHz band. The agreement reached by the Negotiated Rulemaking Committee regarding sharing between RAS and MSS imposes restrictions on MSS operations provides certain operating constraints on MSS mobile earth terminals in geographic areas near RAS sites.[66] If RAS sharing proves burdensome or if GLONASS is not fully moved in a timely fashion, an assignment of 8.25 MHz for each of the two LEO system architectures may not prove equivalent. Further, we do not know if, and the extent to which, foreign systems will impact U.S. systems' operations across the entire band. Consequently, we will defer any decision with respect to the 3.1 MHz between 1618.25 and 1621.35 MHz until, and if, either of those contingencies arises. At that time, we will have a clearer notion of the extent of any inter-service sharing constraints in the lower portion of the 1.6 GHz band. We will not, however, limit our consideration for assignment of this band to the two licensed systems, as the parties to the Joint Proposal urge. We do not think it is advisable at this time to preclude new entrants from access to this band. Rather, we will make the decision with respect to the 3.1 MHz, if necessary, in the context of a rulemaking, based upon the circumstances that have developed at that time.

ii. Other Potential Scenarios

56. Although not specifically addressed in the Notice, the four parties to the Joint Proposal have developed a plan in the event that only one system retains a construction permit.

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[66] See paras. 101 - 109, infra.

In this scenario, the Joint Proposal would provide that that system, whether TDMA/FDMA or CDMA, would be given access to the entire 16.5 MHz of bandwidth.

57. We need not decide now on a course of action to be taken in the event that only one Big LEO system is implemented, whether it is a CDMA or TDMA/FDMA system. If and when that occurs, we will weigh a variety of factors in a rulemaking, including our preference for multiple entry, constraints on the assigned spectrum due to international coordination agreements, system efficiency, and system loading, when considering a spectrum adjustment for that system.

f. System Amendments

58. Several of the commenters question whether applicants will be permitted to change their system designs when amendments are filed. TRW, for example, asks us to clarify that a change in transmission techniques from CDMA to TDMA/FDMA following adoption of service rules will not constitute a major amendment under Commission rules. This concern apparently stems from Section 25.116(c) of our rules, which provides, in general, that any pending application is to be considered a newly filed application if it is amended by a major amendment after a "cut-off" date. The rule contains several exceptions, including instances where the amendment resolves frequency conflicts with other pending applications, but does not create new or increased frequency conflicts.[67]

59. We have repeatedly emphasized that MSS Above 1 GHz applicants who filed by the cut-off date will be afforded an opportunity to amend their applications, if necessary, to bring them into conformance with any requirements and policies that are adopted for satellite systems in these bands.[68] Thus, a change from a GSO system configuration to a LEO system configuration to meet our satellite system design requirement or a change in coverage patterns to conform with our satellite visibility requirements would be permitted without affecting a particular application's status in this processing group. However, a change that is not necessary to bring the application into conformance with our rules and which would increase frequency conflicts, such as a change from a CDMA to a TDMA/FDMA architecture, would render the application a newly filed application to be considered in a future processing group.[69] We recognize that if all six of the pending applicants are found qualified under our Big LEO rules, our five-system sharing plan will not be able to accommodate all of them. We discuss in a

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[67] 47 C.F.R. § 25.116(c)(1).

[68] See Notice, note 2, supra, at para. 18 and Public Notice, note 16, supra.

[69] We note that the three CDMA applicants participating in the Joint Proposal have agreed not to change to a TDMA/FDMA architecture.

succeeding section of this Report and Order the procedures that will apply to applicants in these circumstances and that we will follow to decide among the mutually exclusive applications.[70]

g. Inter-System Coordination

60. Several commenters also suggest that we institute formal, but not necessarily codified, procedures or guidelines for CDMA inter-system coordination in the context of adopting a domestic sharing plan. Some suggest that we use the initial sharing proposal submitted to the Negotiated Rulemaking Committee by the CDMA applicants as the basis for a domestic coordination framework. Indeed, the three CDMA applicants participating in the Joint Proposal agree to coordinate their systems in accordance with this framework expeditiously and in good faith.

61. We applaud the CDMA applicants for their good faith efforts to develop a framework for coordination. We have decided, however, not to incorporate these procedures in the Commission's rules. Historically, we have left domestic and separate international system inter-system coordination to the satellite licensees themselves, since they are in the best position to weigh the technical and economic trade-offs inherent in any coordination agreement.[71] This approach has proven successful. Since the CDMA applicants have represented that sharing is feasible, we expect that good faith efforts to resolve any outstanding coordination issues expeditiously in accordance with the Joint Proposal will commence after this Report and Order is issued. If the parties believe that any entity is not negotiating in good faith or if an impasse is reached on any issue, we will, upon request, become involved in the process and, if necessary, will devise a solution.

62. Another coordination issue raised by some of the commenters is whether and the extent to which a guardband is necessary between CDMA and TDMA/FDMA systems and, if so, which architecture should bear the burden. The parties to the Joint Proposal have agreed to develop an emissions mask between the CDMA and TDMA/FDMA band segments that spreads the burden between them. LQP, in contrast, suggests that an emissions mask may override the allocations made at WARC-92 because a mask will, in essence, protect Motorola's secondary downlink transmissions in the 1.6 GHz band.

63. We need not resolve this matter now. Rather, while we recognize that secondary services cannot, as a general matter, claim interference protection from harmful interference from

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[70] See paras. 88-97, infra.

[71] See, e.g., Hughes Communications Galaxy, Inc., 7 FCC Rcd 4672 (1992), at para. 8; GE American Communications, Inc. 3 FCC Rcd 6871 (1988), at para. 2; Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 50 Fed.Reg. 35228 (1985), at para. 19; RDSS Licensing Order, note 37, supra, at para. 19.

stations of a primary service,[72] we will leave the parties free to negotiate a guardband agreement once the technical parameters of their amended system proposals are finalized. If the parties negotiate an agreement that protects secondary operations, we will accept that solution. If the parties cannot agree, however, we will become involved and will look to the Table of Frequency Allocations to determine where any operational constraints are appropriately placed.

3. Plan If Mutual Exclusivity Is Not Resolved

64. We do not intend to continue our already-prolonged attempt to resolve this proceeding by compromise in the event that mutual exclusivity among the Big LEO applicants is not eliminated by amendments submitted by the November 16, 1994 filing deadline, as there is little reason to suppose that further pursuit of that elusive goal would be useful. In the Notice, we discussed three alternative procedures -- comparative hearing, lottery, and auction -- for resolving this proceeding in the event that the proposed sharing plan did not resolve mutual exclusivity and called for comment concerning the feasibility and/or legal availability of each of them. If an auction or lottery[73] was employed, we proposed to divide the spectrum into paired 2.0625 MHz uplink and downlink segments, with eight paired segments available for licensing. We proposed to limit each successful bidder or lottery winner to an award of up to four 2.0625 MHz paired segments, noting that this should provide ample spectrum to support a Big LEO system while allowing for at least two licensees.[74] We conclude that we can lawfully resolve this proceeding by means of an auction and that, of the three, an auction would better serve the public interest.

a. Comparative Hearing

65. We continue to believe that the prospect of delay in the initiation of service weighs heavily against use of a comparative hearing, particularly in light of the need for prompt participation by U.S. licensees in international coordination.[75] Whether conflict between Big LEO applications could be resolved through a comparative hearing in less time than is typically consumed in comparative hearings involving applications for broadcast licenses -- as TRW, the only commenter advocating use of comparative hearings as a fall-back procedure, contends -- is largely beside the point. Even under the most optimistic assumptions, selection of Big LEO licensees through a comparative hearing is likely to take considerably longer than the use of a lottery or competitive bidding.

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[72] See note 21, supra.

[73] Because the LEO applications were filed prior to July 26, 1993, the Commission is not statutorily prohibited from considering random selection as a licensing option. See Section 6002(e) of Pub.L. 103-66.

[74] Notice, note 2, supra, at para. 45.

[75] Id. at para. 40.

66. We also believe that a comparative hearing would be inadvisable for other reasons. The Commission has previously stated that comparative hearings would be inconsistent with our aim of affording flexibility to satellite licensees.[76] As a general matter, moreover, we are reluctant to substitute our judgment for the wisdom of the marketplace by dictating outcomes based on assessment of the relative merits of applicants' service proposals. We doubt whether we would be able to resolve all conflicts among LEO applications based on findings that certain of the applications are demonstrably technically superior to others. As previously noted, satellite design decisions involve complex trade-offs between engineering, marketing, and financial considerations, which are difficult to evaluate without reference to the functioning of the marketplace.[77] These design decisions are also modified to accommodate regulations, marketplace and financial constraints and uncertainties as these uncertainties become more clearly defined in time.

b. Lottery

67. - Constellation is the only applicant that recommends use of a lottery in the event that we cannot accommodate all qualified applicants. It states that it favors this procedure only because it believes that auctions would create unacceptable international ramifications. LQP and TRW, in contrast, maintain that none of the factors listed in the Conference Report on Section 309(i) would support the use of a lottery procedure is present here.[78] LQP, Motorola, and TRW also contend that a lottery would be inappropriate because the pending applications involve technically diverse, non-fungible proposals. LQP and TRW argue that it would be unfair to the existing applicants, who have invested large sums of money in research and development for their proposals, to choose winners by the luck of the draw. TRW warns that a random selection process here would discourage planning and innovation by future applicants. Motorola objects that the results of a lottery would bear no relation to the best use of the available spectrum and would bestow insufficient spectrum or unusable combinations of spectrum-segments upon the winning applicants.

68. We will not use a lottery in this case because we have concluded that awarding Big LEO licenses through the use of competitive bidding procedures would better serve the public interest. Most importantly, an auction would be an economically efficient means of allocation. A well-designed auction produces an outcome approximating allocation to highest-

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[76] See Rules to Allocate Spectrum for Mobile Satellite Services, 6 FCC Rcd 4900, 4904 (1991), at paras. 19-20; and Rules to Allocate Spectrum for a Land Mobile Satellite Service, 2 FCC Rcd 485, 487 (1987), at para. 15.

[77] 2 FCC Rcd at 487, para. 15.

[78] See 47 U.S.C. § 309(i). See also H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess, at 37 (1982).

valued use, which we believe promotes spectrum efficiency and other public interest considerations.[79] Use of competitive bidding procedures would provide participants with the incentive to conceive innovative, cost-effective and spectrum efficient uses for the spectrum-blocks to be assigned and to estimate accurately their potential commercial value. Further, a lottery may produce a haphazard outcome. Although such an outcome might be partially redressed through resale, that would entail further transaction costs. We do not believe that an auction would have significant adverse international ramifications, as discussed below.

c. Competitive Bidding

69. Legality. Having decided that it would best serve the public interest to use competitive bidding in the event that the sharing plan does not resolve mutual exclusivity, we next respond to arguments concerning our legal authority to do so. Section 309(j)(1) and (2) of the Communications Act, as amended, 47 U.S.C. § 309(j)(1), (2), permits auctions where mutually exclusive applications for initial licenses or construction permits are accepted for filing by the Commission and where the principal use of the spectrum will involve or is reasonably likely to involve the receipt by the licensee of compensation from subscribers in return for enabling those subscribers to receive or transmit communications signals.[80] TRW, however, asserts that "the entire thrust and substance" of the legislation authorizing the Commission to assign licenses by auction is "geared toward" licensing for the personal communication service (PCS) service and that the underlying legislative purposes "simply do not apply to . . . an inherently global . . . satellite service [for which] there are currently no more than six applications." However, nothing in Section 309(j) precludes the use of auctions for satellite services, and the scope of our Section 309(j) authority to use auctions clearly is not limited to PCS licensing.[81] Indeed, we have decided to use auctions for many services besides PCS.[82] Nor

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[79] Second Report and Order in the Implementation of Section 309(j) -- Competitive Bidding, 9 FCC Rcd 2348, 2361 (1994) (Implementation of Section 309(j), at para. 73. Moreover, an efficient auction would award licenses more quickly to those that value them most highly and would facilitate the efficient aggregation of interdependent licenses. We also note that the applicants here did not submit their proposals in reliance on an expectation that the Commission would use lotteries.

[80] No commenter disputes the holding in para. 42 of the Notice that Big LEO service will involve a "use of the electromagnetic spectrum" as defined in 47 U.S.C. §309(j)(2), notwithstanding that most of the applicants propose to provide service to resellers rather than end-users. As we noted previously, the legislative record indicates that it is irrelevant to the applicability of the 309(j)(2) definition whether a licensee's subscribers are end-users or resellers, and we believe that understanding is consistent with the plain meaning of the pertinent statutory text.

[81] The legislative record confirms that proponents of the legislation were well aware that it did not merely pertain to PCS licensing. See H.R. Report No. 103-111, 103d Cong., 1st Sess., at 256 (1993) ("[S]ection 309(j) is a generic statute that will govern the issuance of licenses in many different services"). See also Implementation of Section 309(j), note 79, supra.

does Section 309(j) withhold authority to use auctions for licensing international satellite systems or specify a minimum number of competing applications for a class of licenses that must be on file in order for licenses to be assigned by competitive bidding.

70. Constellation, Motorola and LQP contend that the statute forbids us from conducting an auction until we have used every means to attempt to eliminate mutual exclusivity. Motorola and LQP cite commentary in the House Report and in a letter from Congressman Dingell to then-Chairman Quello as evidence that Congress "clearly had the Big LEO proceeding in mind when it added this language to the bill" and that it believed that mutual exclusivity could be avoided in this proceeding. Further, TRW and COMSAT cite this commentary as proof that Congress enacted Subsection 309(j)(6)(E) to prevent the Commission from using an auction to assign Big LEO licenses.

71. Nothing on the face of Subsection 309(j)(6)(E), or in its legislative history, indicates that we are prohibited from granting Big LEO licenses by auction. The text of the Section merely provides that the Commission should continue to use techniques that avoid mutual exclusivity among applicants. Similarly, the commentary in the House Report states that it generally serves the public interest for the Commission to use engineering solutions and other mechanisms to avoid or eliminate mutual exclusivity and that the Commission should continue to do so in the Big LEO licensing proceeding. The Report does not assert, however, that if the Commission is unsuccessful in resolving mutual exclusivity, the legislation bars the Commission from auctioning Big LEO licenses. Rather, we construe the provision to mean that the Commission is obliged to attempt to eliminate mutual exclusivity. Indeed, if the Commission could avoid mutual exclusivity in every instance in which it arises, no need would exist for the Commission's auction authority. In the course of this proceeding, we have proposed several spectrum sharing plans to that end.[83] We do not think that it would serve the public interest to continue this effort in the event that the six applications before us, as amended in response to this Report and Order, are mutually exclusive.

72. Regardless of our general authority to conduct an auction in the Big LEO service, TRW contends that we may not auction the allocated 2.4 GHz band downlink frequencies because the pending applications for these frequencies are not mutually exclusive. According to TRW, all four applicants desiring to use the 2.4 GHz band could do so on a shared basis using

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[82] For example, auctions will be used to award licenses in the 900 MHz Specialized Mobile Radio Services and the Mutlipoint Distribution Services. See 47 C.F.R. § 1.2102(a).

[83] See, e.g., Committee Report, Addendum 1 (proposal developed by FCC Representative to the Committee that would have permitted all proposed systems to be licensed with some design modifications); Notice, note 2, supra, at para. 38.

the CDMA technology that all of them propose.[84] Similarly, since the same four applicants are the only ones proposing to use the lower six MHz of 1.6 GHz band, TRW argues that we cannot use auctions to assign authorizations for that frequency range either. As TRW sees it, the only portion of the Big LEO spectrum that we can auction consistently with the mutual exclusivity proviso of Subsection 309(j)(1) is the sector of the 1.6 GHz band between 1616-1626.5 MHz, where both Motorola and the CDMA proponents have competing applications on file.

73. We do not agree with TRW that Subsection 309(j)(1) bars us from using an auction to award licenses for the lower portion of the 1.6 GHz band. There is simply not enough spectrum in the band to accommodate all pending applications. While we recognize that there are certain portions of the spectrum in which sharing among CDMA systems is possible (i.e., the 1610-1616 MHz and the 2483.5-2500 MHz bands), these frequencies cannot in themselves accommodate all proposed CDMA systems, including AMSC's. Consequently, these bands cannot be separated from the rest of the MSS frequencies in determining whether mutual exclusivity exists and whether auctions can be employed. Moreover, we are not proposing to conduct an auction until after the applicants have had an opportunity to amend their applications to conform with our rules. If our spectrum sharing plan does not then accommodate the systems of all qualified applicants, the plan will not be implemented. Rather, the 1.6 GHz band spectrum would be segmented and the qualified applicants will be required, in order to preserve their eligibility, to apply for a separate license for each segment that they want to use. Consistent with the mutual exclusivity prerequisite of Subsection 309(j)(1), In the event that only a single eligible application is filed for a particular segment within the filing window, the segment will be assigned to the applicant requesting it. We would not assign the license for a segment through competitive bidding unless two or more eligible applications for it were on file. Winners would be permitted to employ their choice of CDMA or TDMA/FDMA architectures.

74. We do agree with TRW that there is no need to assign 2.4 GHz band authorizations by competitive bidding. Because CDMA systems must use 1.6 GHz uplink and corresponding 2.4 GHz downlink frequencies to operate, we proposed in the Notice to pair 1.6 GHz and 2.4 GHz spectrum blocks for auctioning.[85] All applicants requesting authority to use the 2.4 GHz band concede that they can share it using CDMA technology, however. We therefore conclude that would be more appropriate to license all winners of auctioned 1.6 GHz spectrum blocks to operate in the space-to-Earth transmission direction in the 2483.5-2500 MHz band on a shared basis using CDMA techniques.

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[84] LQP contends, moreover, that segmentation of the 2.4 GHz band pursuant to the tentative auction plan outlined in the NPRM would be impracticable because any CDMA system would require use of all 16.5 MHz of the available 2.4 GHz band, whether it intends to share that spectrum in common with other CDMA systems or to use it exclusively.

[85] Notice, note 2, supra, at para. 45.

75. TRW contends that dividing sharable spectrum into segments and assigning a license for each segment to the highest bidder, as we proposed in the Notice, rather than assigning co-extensive licenses for the entire bandwidth to as many as could share it, would be "spectrum-inefficient" and therefore "manifestly contrary to the auction legislation." Constellation likewise asserts that assigning licenses for discrete segments of the Big LEO spectrum by competitive bidding would probably eliminate any chance of CDMA sharing, as auction winners would probably not consent to share use of their licensed segments with competing service providers. Constellation, accordingly, contends that such a licensing procedure would not promote efficient spectrum use. Similarly, LQP asserts that assigning Big LEO licenses by auction would deter multiple entry and competition.

76. We do not agree that auctioning the 1.6 GHz band in band segments would disserve the statutory objectives of promoting competition and efficient spectrum use. First, it is not clear that using an auction licensing mechanism would discourage spectrum sharing. Applicants who obtain licenses for band segments by competitive bidding could negotiate post-auction sharing agreements among themselves and request license modifications, as TRW acknowledges in its comments.[86] If, in fact, the potential economic value of some or all of the available 1.6 GHz band could best be realized through frequency sharing, licensees will have an incentive to enter into such mutually beneficial sharing agreements, no matter how they acquire their licenses. Second, there is no evident reason to conclude that competitive bidding would impede competition. Our auction rules will ensure that there will be at least two providers. Further, by dividing the available bandwidth into relatively small segments and allowing bidders to acquire several segments and aggregate them, the number of initial licensees and the amounts of spectrum held by particular licensees will be determined largely by market forces.

77. We recognize it is possible that an auction might result in fewer licensees than could otherwise have been accommodated using a sharing plan. As discussed above, however, we have been unable to develop a sharing plan that avoids mutual exclusivity, assuming all applicants are deemed qualified. If mutual exclusivity cannot be avoided by sharing, implementing an auction may achieve countervailing public interest benefits. As we have explained, assigning spectrum rights to those who place the highest value on them generally serves the public interest because it ensures an award to the highest-valued use.

78. We do not agree with LQP that using auctions is contrary to our established policy of favoring multiple entry in new satellite services. We have ensured that our competitive bidding framework will result in at least two licensees, thereby ensuring the benefits of a competitive market structure.[87] Moreover, insofar as our policy permits marketplace incentives

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[86] TRW Comments at 102-103.

[87] See para. 89, infra.

to determine the number of service providers, the policy is fully consistent with our "open skies" satellite policy, which was based on similar considerations.[88]

79. TRW also suggests that we may not lawfully use an auction to assign Big LEO licenses because of the statutory mandate concerning promotion of economic opportunity. TRW claims, for instance, that the statute requires the Commission, consistent with the public interest and the characteristics of the proposed service, to "prescribe ... bandwidth assignments that promote ... economic opportunity for a wide variety of applicants" (emphasis added),[89] which is impossible here given the number of Big LEO licenses that can be awarded. TRW further asserts we cannot meet the statute's requirements to afford opportunity for small businesses, businesses owned by members of minority groups or women, and rural telephone companies, since there are no representatives of those "designated entity" (DE) classes among the existing applicants, that it is virtually impossible for a company qualifying as a small business to raise enough capital to finance construction and operation of a Big LEO system, and that it would be a daunting task to devise a system of viable set-asides for designated entities without drastically impairing the ability of other applicants to implement service.

80. Subsection 309(j)(3) requires the Commission to seek to promote "economic opportunity and competition," among other goals, "by disseminating licenses among a wide variety of applicants, including [DEs]," and Subsection 309(j)(4)(D) directs us to ensure, when prescribing regulations governing auction procedures or eligibility to apply for licenses to be assigned by auction, that DEs are given an opportunity to participate in the provision of spectrum-based services. The statute, however, directs the Commission, in specifying auction procedures, to pursue other objectives, aside from ensuring opportunity for DEs. Among these are the goals of promoting "the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays" and of promoting "efficient and intensive use of the electromagnetic spectrum." 47 U.S.C. § 309(j)(3). In the Notice, we tentatively concluded auctions would further these objectives and we affirm these conclusions in this Report and Order.[90] The statute also implicitly leaves it to the Commission to strike a balance in the public interest among the statutory objectives.[91] Here, only six applications are being considered. No one disputes TRW's assertion that none of the applicants qualifies as small, minority-owned or women-owned.[92] It therefore would appear that to disseminate Big LEO licenses to DEs we

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[88] Domestic Communications Satellite Facilities, 22 FCC 2d (1970), 35 FCC 2d 844 (1972), recon. in part, 38 FCC 2d 665 (1972) (DOMSAT I, II, and III, respectively).

[89] 47 U.S.C. § 309(j)(4)(c).

[90] See Notice, note 2, supra, at para. 43.

[91] See Implementation of Section 309(j), note 79, supra, at para. 74.

[92] See Docket 93-253 for criteria.

would have to open a new filing window for Big LEO applications.[93] While in some circumstances it might be feasible to take such an approach, we believe that it is not the case here. To ensure that this needed service is made available as quickly as possible, particularly to rural residents not otherwise served by the telecommunications infrastructure, and to preserve the opportunity for the United States to continue its leadership role in promoting global development through an enhanced global information infrastructure, we are committed to awarding licenses by January 31, 1995.[94] Opening a new filing window would make that goal impossible. Potential new applicants would need a reasonable amount of time, traditionally three months from the date of publication in the Federal Register, in which to develop and submit system proposals.[95] Opening a new filing window also would be inequitable to the pending applicants, who filed their proposals well before Section 309(j) was enacted and who have spent considerable time and expense participating in this proceeding. In light of these considerations, we believe that an auction to award Big LEO licenses is an appropriate exercise of our discretion.

81. Other considerations. In the Notice, we recognized that although auctions appear advantageous for many reasons, the approach might have unintended consequences internationally. In particular, we noted that other countries may look to our lead in imposing these costs on Big LEO systems.[96] Given the number of countries that may be served by Big LEO systems, we stated that these costs may be considerable and may preclude a U.S.-owned system from serving other countries. We noted, however, that these costs may not in fact be significant in countries that seek to ensure that voice MSS is available within its borders. We further noted that applicants will pay no more than that which they determine is consistent with their expected revenues from providing service in that country. Nevertheless, we recognized that the international nature of the Big LEO service raises concerns that are not applicable to the domestic-only services for which auctions are implemented and requested comment on this issue.

82. Motorola, Constellation, LQP, TRW, and COMSAT all contend that an auction is inadvisable because it would set a bad example for foreign governments. If foreign governments were to use auctions to assign spectrum rights, they maintain, the cost of providing global MSS would be driven up, possibly to such an extent that Big LEO operators would be unable to provide worldwide service. TRW asserts that the consequent cost increases might deter most potential entrants, to the impairment of competition, or might even make it infeasible for anyone to provide Big LEO service. COMSAT speculates that foreign governments might conduct auctions in a manner that places U.S. companies at a disadvantage.

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[93] DEs can, of course, participate in the Big LEO industry by leasing space segment capacity, by manufacturing user handsets, or by offering services to end users.

[94] See also note 6, supra.

[95] See NVNG MSS Order, note 48, supra. See also RDSS Licensing Order, note 37, supra, where licensee was given six months to amend its applications to conform to rules as adopted.

[96] Notice, note 2, supra, at para. 44.

83. The comments have provided no concrete evidence, however, that an auction would have these harmful effects. We have concluded elsewhere that, as a general matter, the public interest is served by awarding licenses to those who assign the highest value to them.[97] In light of these substantial public interest benefits, the commenters' mere recitals of the concerns we raised in the Notice do not persuade us that auctions are inadvisable.

84. We doubt, first, that our choice of licensing method for the Big LEO service will determine foreign licensing practices as much as the commenters predict. Foreign officials already know that we recently obtained a statutory mandate for assigning spectrum licenses by competitive bidding and have decided to assign licenses of enormous aggregate commercial value for a variety of new services by that means. We assume that those responsible for assigning spectrum rights in other countries will conduct spectrum auctions if that would best serve the interests that they are obliged to promote, regardless of what we choose to do in this proceeding. Further, even if auctions are implemented, applicants will bid no more at an auction than that which they determine is economically feasible.

85. Conversely, TRW contends that if we assign Big LEO licenses at auction and foreign authorities issue such licenses to others free of charge, the U.S. licensees would be at a competitive disadvantage in the global market. Constellation similarly maintains that by assigning the licenses at auction the Commission "would create an incentive for U.S. companies to develop LEO technology through foreign based systems that did not have to spend significant amounts of capital for operating licenses." TRW also contends that companies who purchase MSS licenses in the United States at auction might encounter unfair competition from INMARSAT because the INMARSAT Convention and the Communications Satellite Act might be construed to require that COMSAT be allowed to access INMARSAT capacity from the U.S. without paying for spectrum use.

86. We do not believe the prospect that auctions will be conducted only in the United States would disadvantage U.S. licensees globally. We have not yet decided whether, and the terms on which, foreign providers, including INMARSAT, will be able to provide domestic service. We envision that reciprocal bilateral arrangements on a country-by-country basis will be negotiated. In reaching and implementing these arrangements, we will consider at that time whether foreign entities not subject to U.S. auctions would have the economic incentive and ability to offer domestic service at significantly lower rates than Big LEO operators who purchased spectrum. Further, under this scenario, both U.S. operators and foreign operators appear able to receive licenses free of charge in a foreign country. We fail to see how this would put U.S. operators at a "global disadvantage." Finally, contrary to Constellation's argument, we see no reason to suppose that applicants who could compete successfully as providers of Big LEO service in the U.S. market would lose interest in developing systems in the United States merely because it would be necessary to purchase licenses. If it would be undesirable to serve

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[97] Implementation of 309(j), note 79, supra, at paras. 73-74 and n.65.

the U.S. market at high spectrum prices, the prices paid at an auction should fall until serving the U.S. market is commercially desirable.

87. Consequently, we conclude that we have the statutory authority to award Big LEO licenses through an auction process. We will implement competitive bidding procedures in the event that all six pending applicants file amendments on November 16, 1994 that meet all requirements, including financial requirements, for the Big LEO service, but their applications are still mutually exclusive.[98] We place applicants on notice that if an auction needs to be held it will be scheduled as quickly as possible. Given the importance of proceeding with Big LEO licensing, preparation time for the applicants will necessarily be circumscribed.

d. Competitive Bidding Procedures

88. Segmentation. As proposed in the Notice, we will divide the 1.6 GHz band spectrum into eight 2.0625 MHz segments.[99] We recognize that Constellation and LQP assert that a 2.0625 MHz block is "unworkable" because it is inconsistent with some of the applicants' channelization plans, which proposed 1.25 MHz channels. Further, LQP asserts that any auction of discrete bandwidth segments within the 1.6 GHz band would inevitably result in some applicants getting unusable, disjointed spectrum blocks. We do not believe these concerns warrant a change in the proposed spectrum blocks. First, two of the six applicants do not propose to use 1.25 MHz channels. Moreover, any anomalies in spectrum awards can be corrected in post-auction transactions, as we intend (as explained infra) to allow the licensees to aggregate and disaggregate spectrum through resale.

89. Bandwidth cap. To ensure that there are at least two Big LEO providers, we will not permit any applicant to acquire more than four 2.0625 MHz band segments in the 1.6 GHz band, i.e., no more than 8.25 MHz, at auction.[100] We would also deny permission for a post-auction transaction that would result in an accumulation in excess of that limit in the absence of a compelling showing of justification for a waiver.

90. Competitive Bidding Design. In determining the procedures to be employed if an auction of Big LEO licenses is necessary, we are guided by the principles developed in PP

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[98] If some applicants defer their financial showings as described in para. 13, supra, all deferred applications may not be able to be granted. If, at that time, we have issued some licenses, we will not implement the auction procedure described below, which assumes that none of the MSS spectrum has been assigned, to choose among the mutually exclusive deferred applications. Rather, as noted, we will develop another processing procedure at that time.

[99] As discussed in the Notice, it appeared that as little as 2.0 MHz of spectrum could provide an individual CDMA system with the same capacity as it would have operating on a shared basis over 11.35 MHz of spectrum. See Notice, note 2, supra, at para. 45.

[100] See Notice, note 2, supra, at para. 45.

Docket No. 93-253, the proceeding instituted to implement Section 309(j) of the Communications Act. The Second Report and Order in that proceeding[101] established the criteria to be used in selecting the auction design method to use for each particular auctionable service. The Commission received voluminous comment on auction design issues. Generally, we concluded that awarding licenses to those parties who value them most highly will foster Congress's policy objectives. In this regard, we noted that since a bidder's ability to introduce valuable new services and to deploy them quickly, intensively, and efficiently increases the value of a license to that bidder, an auction design that awards licenses to those bidders with the highest willingness to pay the most tends to promote the development and rapid deployment of new services and the efficient and intensive use of the spectrum. In articulating our auction design principles we agreed with the weight of the comments in that proceeding -- many of which were supported by academic auction design experts -- that: (1) licenses with strong value interdependencies should be auctioned simultaneously; (2) multiple round auctions generally will yield more efficient allocations of licenses and higher revenues, especially where there is substantial uncertainty as to value because they provide bidders with information regarding other bidders' valuations of licenses; and (3) since they may be relatively expensive to implement and time-consuming, simultaneous and/or multiple round auctions may become less cost-effective as the value of licenses decreases.[102]

91. Based on the foregoing, we concluded that where the licenses to be auctioned are interdependent and their value is expected to be high, simultaneous multiple round auctions would best achieve the Commission's goals for competitive bidding.[103] We indicated that compared with other bidding mechanisms (such as sequential and sealed bid auctions), simultaneous multiple round bidding will generate the most information about license values during the course of the auction and provide bidders with the most flexibility to pursue back-up strategies. Thus, we concluded that simultaneous multiple round bidding is most likely to award interdependent licenses to the bidders who value them most highly. We also indicated that this method will facilitate efficient aggregation of licenses across spectrum bands, thereby resulting in vigorous competition among several strong service providers who will be able rapidly to introduce a wide variety of services highly valued by end users.[104] In addition, we concluded that because of the superior information and flexibility it provides, this method is likely to yield greater revenues than other auction designs. Thus, we found that the use of simultaneous multiple round auctions would generally be preferred.[105]

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[101] Note 79, supra.

[102] Id. at para. 69.

[103] Id. at paras. 109-111.

[104] Id. at para. 106.

[105] Id.

92. Because, however, simultaneous multiple round bidding is likely to be more administratively complex and costly both for bidders and for the FCC than sequential or single round bidding, we indicated that we would use this auction design only where license values are interdependent and the expected value of the licenses to be auctioned is high relative to the costs of conducting a simultaneous multiple round auction.[106]

93. If it becomes necessary to employ competitive bidding procedures to award Big LEO licenses, we will conduct a single simultaneous multiple round auction to award licenses in those 2.065 MHz bands for which two or more applications have been filed.[107] Each of the characteristics that lead to selection of this auction design are present here. We expect that there will be a high degree of interdependence in the values of Big LEO licenses. Licenses may be interdependent either because they are substitutes or because they are worth more as part of a package than individually. We would expect there to be some substitutability among these licenses. There may be important ways in which they might be complements as well. Though all will be nationwide licenses, a single entity will be able to aggregate up to four licenses. It is reasonable to assume that the value that a bidder places on one license will to at least some degree depend upon whether it will be able to acquire other licenses. We also expect that the value of Big LEO licenses will be high relative to the costs of conducting a simultaneous multiple round auction, in part because as the Commission gains experience with simultaneous multiple round auctions, the costs associated with of implementing them may fall.

94. Procedural, Payment and Penalty Issues. Through our July 1994 auction of nationwide licenses to provide Personal Communications Services in the 900 MHz band (narrowband PCS), we have gained some experience with simultaneous multiple round auctions. It appears that the rules we adopted concerning the procedures to be used in conducting auctions, the schedule for payment for licenses, and the penalties to be paid for bid withdrawal, default or disqualification, have worked well.[108] In the event that it becomes necessary to employ competitive bidding in Big LEO licensing, we will conduct auctions as specified under those rules. If such an auction is required, we will issue a Public Notice explaining further the administrative details of the auction, but we generally expect the auction will be conducted similarly to the nationwide narrowband PCS auction.

95. In order to reduce the risk of defaults and to ensure that the Commission has a ready source of funds to satisfy any bid withdrawal or default penalties, we will impose a requirement that, to be qualified to participate in the Big LEO auction, applicants must submit

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[106] Id. at paras. 110-111.

[107] See para. 73, supra.

[108] See Sections 1.2104-1.2109 of the Commission's Rules, 47 C.F.R. §§1.2104-1.2109.

an upfront payment to the Commission prior to the auction.[109] Consistent with our auction rules for Personal Communications Services, we have decided to set the upfront payment at approximately two cents per MHz of spectrum per person residing in the proposed service area ($0.02 per MHz-pop).[110] Because Big LEO systems must be able to provide service to all areas of the fifty states, $0.02 per MHz-pop would amount to approximately $10 million per 2.0625 MHz segment.[111] For simplicity, we will round this to the nearest million, and require an upfront payment of $10 million.

96. Resale, aggregation and disaggregation. Aside from imposing the 8.25 MHz cap on aggregation, we will not restrict auction winners from reselling 1.6 GHz band spectrum-rights. They would be free not only to resell 2.065 MHz segments but also to reassign any smaller portion of 1.6 GHz band spectrum. Affording such flexibility enhances beneficial incentives.[112] Although we do not think that such post-auction transactions would be likely to entail unjust enrichment,[113] applications for consent to assignment of Big LEO spectrum authorizations obtained by auction will be subject to the disclosure and close-scrutiny policies delineated in the Second Report and Order in the auction rulemaking.[114]

97. Assignment of 2.4 GHz band. As previously noted, all auction winners will be authorized to operate over the entire 2483.5-2500 MHz band, with the stipulation that operation in that band must be in the CDMA mode and must be used for downlink transmissions.

B. Interservice Sharing

98. In the Notice, we recognized that Big LEO systems will be required to share the 1.6/2.4 GHz and adjacent frequency bands with a number of existing services. In the 1.6 GHz range, the 1610-1626.5 MHz band is allocated to the aeronautical radionavigation service (ARNS) on a co-primary basis, and a segment of the band, at 1610.6-1613.8 MHz, is allocated to the radioastronomy service (RAS) on a co-primary basis. In the 2.4 GHz range, the 2483.5-2500 MHz band is allocated for co-primary use by the broadcast auxiliary service, by the terrestrial

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[109] The upfront payment will be fully refunded to unsuccessful bidders who are not subject to bid withdrawal or default penalties.

[110] See Implementation of Section 309(j), note 79, supra, at para. 169 and 47 C.F.R. § 1.2106.

[111] I.e., .02 x 2.0625 x [U.S. pop.]

[112] Of course, parties to such transactions must comply with 47 U.S.C. § 310(d) by filing applications for consent to assignment.

[113] See Implementation of Section 309(j), note 79, supra, at paras. 211-12.

[114] Id. at para. 214.

fixed-service and by industrial, scientific and medical (ISM) operations. Adjacent bands are allocated to the aeronautical radionavigation satellite service, the instructional television fixed service (ITFS) and the multi-channel multi-point distribution service (MMDS).

99. The Negotiated Rulemaking Committee was comprised of Big LEO applicants and representatives of most parties potentially affected by Big LEO services, and analyzed extensively interservice sharing at 1.6/2.4 GHz. We used the Committee's recommendations as the primary basis the proposals in our Notice. We sought comment on those proposals as well as on those areas where a representative of an affected interest did not participate in the Committee, or where the Committee could not reach a consensus on an interservice sharing issue.

1. Radio Astronomy Service

100. As noted above, the 1610.6-1613.8 MHz frequency band is allocated to the RAS on a co-primary basis.[115] RAS operations involve the reception of radio waves of cosmic origin,[116] and are responsible for amassing a substantial portion of information about the universe that has been acquired in the last sixty years. Because the RAS involves only radio reception, it cannot interfere with other services operating in the same frequency band. However, it can receive harmful interference from other services. As a co-primary service, the RAS is entitled to protection from harmful interference. Ensuring this protection is complicated by the nature of cosmic radiation emissions, which are similar to random noise emissions and have extremely low power flux density levels at the Earth. Further, there is a potential for both in-band and out-of-band interference.[117]

a. In-band interference to the RAS

101. The Committee was able to agree on procedures that would permit sharing between Big LEOs and the RAS. The Committee's task was made somewhat easier by the fact that radio astronomy observations are usually conducted in remote areas and are not always continuous. The Committee's proposal, developed cooperatively with the Committee on Radio Frequencies

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[115] The 4990-5000 MHz band is also allocated to the RAS on a primary basis. Second harmonic spurious emissions from 2.4 GHz MSS operations could cause interference to RAS in that band. See paras. 120-121, infra.

[116] See international Radio Regulations 55 and 14.

[117] An out-of-band emission is radio frequency energy, located on a frequency or frequencies immediately outside the necessary bandwidth, that result from the modulation process. This does not include spurious emissions, which may be reduced without affecting the corresponding transmission of information. See 47 C.F.R. § 2.1.

(CORF),[118] would establish fixed-radius protection zones around the sixteen radio astronomy sites in the United States and technical requirements for MSS downlink transmissions. Based on this recommendation, we proposed to establish protection zones around radio astronomy sites in the United States as a means of preventing MSS transmissions from interfering with RAS observations in the 1610.6-1613.8 MHz band.[119] To that end, we also proposed that "all 1.6/2.4 GHz MSS systems shall be capable of determining the position of MSS user transceivers accessing the space segment through either internal radiodetermination calculations or external sources such as LORAN-C or GPS." [120]

102. Big LEO parties generally agree with the fixed-radius protection zone approach. However, both TRW and Constellation question whether it is necessary to require all MSS systems to be capable of determining the position of their user terminals.[121] They contend that a position location requirement need not be imposed on those MSS systems that elect to use beacon-actuated protection systems as a means for avoiding harmful interference to RAS observations.

103. As we stated in the Notice, the Committee decided that a beacon actuated protection system might provide an alternative to fixed radius protection zones. Under such a system, a beacon would transmit a signal when RAS observations were in progress. Upon receipt of this signal, an MSS control center would automatically assign the MSS terminal to a communications channel outside of the shared MSS-RAS frequency band. The Committee concluded, however, that several theoretical and practical concerns must be addressed before a beacon system can be implemented.[122] CORF continues to support that position.[123]

104. Because beacon actuated protection systems are not yet fully developed, we will adopt our original proposal that requires MSS operators to protect RAS observations in the 1610.6-1613.8 MHz band using the fixed-radius protection zone method. Nevertheless, because we expect that more efficient solutions will be developed, we will permit MSS licensees to use smaller geographic protection zones in lieu of the specified areas upon a showing that MSS operations will not cause harmful interference to an RAS observatory during periods of

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[118] CORF operates under the auspices of the National Academy of Sciences and is responsible for advancing the interest of radio astronomy in the United States.

[119] See proposed Section 25.213(a)(1)(i)-(iii).

[120] See proposed Section 25.213(a)(1).

[121] TRW Comments at 120, Constellation Reply at 43.

[122] Notice, note 2, supra, at n.90.

[123] CORF Reply Comments at 4.

observation.[124] We will, however, as proposed, allow beacon-actuated protection zones to be used in lieu of fixed protection zones if a coordination agreement is reached between a mobile-satellite system licensee and the Electromagnetic Spectrum Management Unit (ESMU) on the specifics of beacon operations."[125] Should any of the Big LEO licensees show at a later time, and coordinate with the ESMU, that certain other methods can be used in lieu of the fixed-radius protection zone, we will allow MSS system operators to employ these methods. In the interim, however, position determination of MSS user transceivers is necessary to accomplish fixed-radius zone protection. Therefore, we adopt as part of Section 25.213(a)(1), the MSS user transceiver position determination requirement as proposed in the Notice.

105. In the Notice, we also proposed that MSS user transceivers be capable of terminating operations as soon as practicable upon entering an RAS protection zone.[126] LQP argues that our proposal would require that calls initiated outside of an RAS protection zone be terminated as soon as the MSS user transceiver moves within the protection zone, which, according to LQP, would be inordinately complex and costly.[127] LQP suggests that our rules should permit the call to be switched successfully to frequencies outside of the RAS bands (during RAS observations) before operations are terminated to that unit.[128]

106. We believe that LQP's suggestion is reasonable. Allowing calls initiated prior to entering an RAS protection zone to continue until a non-RAS frequency is found will ensure continuity of service to the MSS user. Further, we believe that other requirements that we are adopting, such as the notification requirement that is described below, will ensure that RAS operations are not affected adversely. Therefore, we modify proposed Section 25.213(a)(1)(v) as suggested by LQP.

107. We also proposed in the Notice to require that the ESMU notify MSS licensees in the 1610.6-1613.8 MHz band of radio astronomy observations.[129] This requirement was proposed to ensure that MSS operations terminate as soon as possible after an MSS user transceiver enters a RAS protection zone where observations are being made. CORF suggests that it could meet this requirement by providing MSS operators with schedules of RAS

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[124] See Section 25.213(a)(1)(v).

[125] See Section 25.213(a)(1)(vii). The ESMU falls under the auspices of the National Science Foundation and is responsible for coordinating RAS frequencies.

[126] See proposed Section 25.213(a)(1)(v). Notice, note 2, supra, at para. 50.

[127] LQP Reply at 58.

[128] LQP Comments at 64.

[129] See proposed Section 25.213(a)(1)(v).

observations.[130] TRW disagrees, stating that CORF should be required to provide notification "of periods of actual radio astronomy observations rather than a general schedule."[131] We agree with TRW that it would not be overly burdensome for the ESMU to notify the small number of licensed in-band Big LEO operators of periods of actual RAS observations. This will help ensure that no interference is caused to RAS observations in the event that a schedule is changed.

108. In a related matter, Motorola notes that the Committee suggested that RAS observations not be scheduled during peak MSS/RDSS traffic periods to the extent possible.[132] CORF does not object to this proposal.[133] RAS observations are usually carried out in remote areas and are not continuous. Even during peak MSS traffic periods, the majority of MSS traffic should not occur in RAS observation areas. We do not therefore believe that adherence to this provision will be burdensome to RAS. Consequently, we include this provision in our rules in Section 25.213(a)(4).

109. Finally, TRW requests that we agree to solicit public comment before we require MSS systems to protect additional RAS sites beyond the sixteen sites specified in the rules.[134] In bands shared by two or more services on a co-primary basis, new facilities in either service must be coordinated among affected operators. As provided for in proposed rule Section 25.213(1)(a)(viii), which we adopt, we will solicit comment with respect to protection from additional RAS sites.

b. Out-of-band interference to RAS from primary MSS uplinks at 1.6 GHz

110. In the Notice, we also recognized that MSS uplink operations in the 1613.8-1626.5 MHz portion of the band could cause unacceptable out-of-band interference into RAS operations at 1610.6-1613.8 MHz. We also noted the Committee's suggestion to establish fixed protection zones similar to, but smaller than, those recommended for in-band emissions, although we did not propose a rule in this regard.[135]

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[130] CORF Comments at 4-5.

[131] TRW Reply Comments at 72.

[132] Motorola Comments at 55, n. 41.

[133] Specifically, CORF supports insertion of the following text in the rules: "The RAS shall avoid scheduling radio astronomy observations during peak MSS/RDSS traffic periods to the greatest extent practicable." See CORF Reply at 2.

[134] Proposed Section 25.213(a)(1)(vii).

[135] Notice, note 2, supra, at para. 51.

111. CORF suggested several alternatives to our proposals:[136]

(1) to require that the power flux density (pfd) level reaching RAS sites from a mobile user terminal operating anywhere in the 1610-1626.5 MHz band not exceed the pfd from a mobile user terminal operating within the RAS 1610.6-1613.8 MHz band segment at the edge of the protection zone applicable for that site, or

(2) to prohibit mobile terminal operations within the 1613.8-1615.8 MHz band during RAS observations within protection zones of 100 km or 30 km around RAS sites depending upon the type of observatory involved. [137]

112. The MSS parties generally oppose restrictions on out-of-band emissions for the purpose of protecting RAS. For example, Constellation argues that MSS out-of-band levels should not be unilaterally defined by the radio astronomy community without any regard to the impact those levels would have on other services.[138] TRW states that it could agree to CORF's suggestions if a compliant mobile user terminal were not required to undertake further coordination with the RAS. TRW notes, however, that CORF's out-of-band protection proposals would relegate MSS to co-primary or even lower status in frequency bands that are not allocated to the RAS."[139] Only LQP generally agrees with CORF's suggestion. According to LQP, there is sufficient 1.6 GHz band spectrum to switch MSS users near RAS sites from potentially interfering channels to channels separated from RAS observations.[140]

113. We have considered the impact of this proposal on Big LEO licensees and conclude they would not be unduly burdened by protecting RAS observations from out-of-band MSS emissions. It appears that less than one percent of the MSS consumer use would be affected by CORF's alternative proposals for protecting RAS from out-of-band MSS emissions.[141]

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[136] See CORF Comments at 3-4.

[137] Radio astronomy observatories use two types of antennas. Observatories with a very long baseline array (VLBA) use interconnected radio telescopes that are dispersed in widely separated locations. Due to the geographic separation of the telescopes, the chance of correlated interference from any single mobile earth terminal is small. Consequently, VLBA sites are not as susceptible to interference as are observatories using a single radio telescope. Eleven of the 16 radio astronomy sites in the U.S. are VLBA sites and they require relatively smaller protection zones than non-VLBA sites.

[138] Constellation Comments at 47.

[139] TRW Reply at 71.

[140] LQP Reply Comments at 57, Reply Tech Appendix at 2.1.

[141] CORF Reply Comments at 8.

Further, those affected would not be denied communications. They would simply be assigned to another uplink channel by the MSS network control center. We do not believe that the CORF proposals relegate the MSS to co-primary or even lower status. The RAS is seeking protection in bands only in the 1610.6-1613.8 MHz band, which is allocated to the RAS. Therefore we adopt CORF's proposals to protect RAS, during observations, from out-of-band emissions caused by Big LEO systems. If Big LEO operators cannot meet the power density levels necessary to protect RAS from harmful interference, we will require that Big LEO operations be terminated within the protection zones specified in Section 25.213(a)(1)(iii).

c. Out-of-band interference to RAS from secondary downlinks in the 1.6 GHz band

114. In the Notice, we proposed to codify the Committee's recommendations to eliminate potential harmful out-of-band interference to RAS from secondary MSS downlinks operating at 1613.8-1626.5 MHz.[142] The Committee recommended that such operations be restricted to frequencies separated by the upper edge of the RAS band by at least 2.2 MHz, that MSS downlink emissions be filtered aboard the spacecraft, that frequencies be selectively controlled and that an analysis and testing program be conducted in cooperation with the radio astronomy community. Based on its deliberations, the Committee proposed that we adopt rules governing use of the 1613.8-1626.5 MHz band that limit out-of-band emissions so that they do not exceed -238 dB(W/m^2/Hz) during observations at non-VLBA sites and -198 dB(W/m^2/Hz) during observations at VLBA sites.

115. Motorola argues that the limits proposed in the Notice are too rigid and would unduly constrain MSS operations.[143] In support, Motorola contends that those limits were devised originally using assumptions that are not applicable to Big LEO operations. For example, Motorola notes that the calculations assumed an immobile, continuous interference source, whereas secondary MSS downlink LEO operations would present an intermittent source. Further, Motorola notes that although the Committee reached a consensus on a recommendation regarding limits, it did not agree on a proposed rule to govern Big LEO MSS operations. Motorola asserts that instead of adopting specific protection limits applicable to MSS secondary downlinks, the Commission should only restate the general obligation that secondary services not cause harmful interference to primary services.

116. LQP and TRW disagree with Motorola. LQP states that our proposal is reasonable and should be adopted.[144] TRW asserts that Motorola's proposal does not adequately consider the needs of the RAS. It states, however, that if secondary downlinks are limited to the

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[142] Notice, supra note 2, at para. 51; see also proposed Section 25.213(a)(2).

[143] Motorola Comments at 54.

[144] LQP Reply at 59-60.

1621.35-1626.5 MHz band, thereby creating a 7.5 MHz guardband between RAS and secondary MSS, Motorola's proposals would be acceptable.[145]

117. We recognize the need to protect RAS observations from secondary MSS downlink operations. At this juncture, however, we need not consider specific limits on Big LEO MSS secondary downlinks. Secondary services by definition shall not cause harmful interference nor claim protection from primary services.[146] This provision applies to protection of primary services from both in-band and out-of-band emissions and would apply to secondary MSS downlinks regardless of specified pfd levels. Thus, we see no reason to codify specific pfd limits as proposed in the Notice. We will instead modify proposed Section 25.213(a)(2) to note that secondary MSS downlinks shall not cause harmful interference to primary RAS operations in the 1610.6-1613.8 MHz band. Further, operators of secondary downlinks will be required to take whatever steps necessary to resolve interference complaints by radio astronomers. We expect that an applicant proposing to operate MSS downlinks in the 1613.8 - 1626.5 MHz band will be able to demonstrate in its application that it has sufficient satellite out-of-band emission attenuation to protect adjacent band U.S. RAS operations based upon the frequency separation inherent in the frequency assignment scheme adopted here.

118. Finally, Cornell University, Arecibo Observatory, notes its concern that MSS downlink transmissions at 1.6 GHz could have a "disastrous effect" on passive space research in the 1610-1667 MHz band.[147] LQP, in support of Cornell, notes that the Commission must limit MSS downlink transmissions to the 5.15 MHz proposed in the Commission's Notice, that is, to 1621.35-1626.5 MHz.[148] Motorola responds that "the 1613.8-1660 MHz band is not allocated to the RAS on a primary or secondary basis" and thus is not entitled to protection from secondary MSS downlinks operating outside that band.[149]

119. There is no RAS allocation in the 1613.8-1660 MHz band and the service is therefore not entitled to protection in these bands Consequently, we will not limit MSS transmissions in order to protect RAS as suggested by Cornell University and LQP. In any case, we do not believe that RAS observations above 1634 MHz would be affected by secondary MSS downlinks in the 1621.35-1626.50 MHz band given the frequency separation.

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[145] TRW Reply Comments at 74.

[146] See note 21, supra.

[147] Cornell Comments at 3-5. The 1610-1667 MHz band is being used passively, without any allocation, by radio astronomers to observe red-shifted Hydroxyl (OH) emissions.

[148] LQP Reply Comments at 59.

[149] Motorola Reply Comments at 49

d. Spurious emissions into the 4990-5000 MHz from primary downlinks in the 2483.5-2500 MHz band

120. The Committee recognized that second harmonic spurious emissions from primary MSS downlink transmissions in the 2483.5-2500 MHz band could cause unacceptable interference to RAS operations in the 4990-5000 MHz band. It concluded and we proposed in Section 25.213(a)(3) that MSS downlink out-of-band spectral power flux density (spfd) levels should be limited to -241 dB(W/m^2/Hz) in the 4990-5000 MHz band.

121. We will adopt the rules as proposed. Although Constellation argues that it opposes any such codification of the radio astronomy community's definition of "unacceptable" interference,[150] we note that Constellation participated in the Committee and its deliberations and agreed to the Committee's Report that included this recommendation. More importantly, as stated in the Notice, we believe that these limits can be readily met through proper amplifier device selection and operating conditions in combination with post-amplifier filtering.

2. Aeronautical Radionavigation Satellite Service and Radionavigation-Satellite Service

122. The U.S. Global Positioning System (GPS) can operate under the radionavigation-satellite (space-to-Earth) service (RNSS) allocation in the 1565.2-1585.6 MHz band. GPS is a space-based positioning, velocity, and time system whose space segment, when fully operational, will be composed of 21 operational satellites in six orbital planes. GLONASS, the Russian Global Navigation Satellite System, can operate under the same service allocation in the 1597-1610 MHz bands.[151] Additionally, GLONASS can operate under the aeronautical radionavigation service (ARNS) allocation in the 1610-1616 MHz band pursuant to RR 732 of the international Radio Regulations.[152] The GLONASS system will include 24 operational satellites in three orbital planes. The user segment of both the GPS and GLONASS systems will consist of antennas and receiver-processors that can receive both GPS and GLONASS signals to provide positioning, velocity, and precise timing to the user. The Committee addressed ARNS/RNSS - MSS sharing and developed specific recommendations in that regard. We based the sharing proposals in the Notice on the Committee's recommendations and on requirements embodied in the International Radio Regulations.

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[150] Constellation Comments at 48.

[151] See Notice, note 2, supra, at para. 53.

[152] RR 732 reserves the 1610-1626.5 MHz band on a worldwide basis for the use and development of air navigation and directly associated terrestrial or satellite based facilities. It also provides that any satellite use of the band is subject to agreement under the procedures of Article 14 of the International Radio Regulations. Pursuant to the international Radio Regulations, MSS stations may not cause harmful interference to or claim protection from stations operating in accordance with RR 731E.

a. In-band interference to ARNS from MSS uplinks in the 1610-1626.5 MHz band

123. Pursuant to international Radio Regulations, MSS stations may not cause harmful interference to or claim protection from stations operating under RR 732. Further, international Radio Regulation RR 731F provides that MSS earth stations operating with MSS space stations cannot radiate an equivalent isotropically radiated power (e.i.r.p.) density greater than -15 dB(W/4KHz) in that portion of the band used by systems operating in accordance with RR 732, and -3 dB(W/4KHz) in bands not so used.

124. The Committee concluded that GLONASS receivers operating on-board high altitude aircraft could be protected against interference from MSS operations operating in accordance with RR 731E.[153] It also concluded that protection would not be possible if GLONASS is used for aircraft approach and terminal communications, as is contemplated by the FAA.[154] The Committee recommended and we proposed in Section 25.213(c)(1) to codify the uplink e.i.r.p. limits contained in RR 731E. The Committee had stated that this limit is needed to allow the proposed Big LEO systems to be implemented, although it acknowledged that it will not protect GLONASS if GLONASS is used to provide aircraft approach and terminal communications as a component of a "sole means" GNSS. The Committee also examined several methods to improve the ARNS/RNSS - MSS sharing environment. One was to reconfigure GLONASS so that it would operate only on frequencies below 1610 MHz.[155] Another method

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[153] The Committee analyzed the potential levels of interference from a typical CDMA mobile unit to a GPS/GLONASS receiver. It concluded that MSS units would not interfere with enroute GLONASS navigation at altitudes in excess of 10,000 meters (Committee Report, note 23, supra, at 3.3.4.3). However, aviation parties participating in the Committee stated that the analysis was inadequate to demonstrate interference compatibility at a 95 percent confidence level.

[154] See para. 49, supra. For a further discussion of the disparity between ARNS protection requirements and MSS user terminal e.i.r.p. requirements, see Committee Report, note 23, supra at 18-21.

[155] The Committee offered two possible methods for limiting GLONASS operations to frequencies below 1610 MHz. One would be to reconfigure the GLONASS frequency plan. Currently, the plan is for a total of 24 GLONASS satellites to operate using 24 discrete downlink carrier frequencies. However, GLONASS satellites currently under construction have the ability to operate on any of the 24 frequencies distributed between 1602 and 1615.5 MHz. This frequency agility could allow antipodal satellites (those above opposite areas of the earth) to operate using the same frequencies. Thus, the entire system could operate using 12 frequencies below 1610 MHz. The other method would be to shift all 24 GLONASS frequencies to spectrum below 1610 MHz. The Committee noted, however, that this more radical approach might require redesign of the GLONASS system. In any event, both the aviation community and the Big LEO community have indicated that they fully expect GLONASS to shift to frequencies below 1610 MHz at some point. The recent bilateral coordination meetings with the Russian Federation have confirmed that the GLONASS system will shift its frequencies to below 1606 by 2005 or sooner.

for improving sharing possibilities, it noted, would be to modify GLONASS receiver standards to reduce vulnerability to interference from in-band MSS. Alternatively, it suggested that the U.S. GPS be enhanced to lessen or eliminate reliance on GLONASS altogether. Further, the Committee recommended, and we proposed in Section 25.213(c)(2), that to protect operations of GLONASS receivers on-board aircraft, MSS terminals should be prohibited from being used on civil aircraft.

125. Aeronautical Radio, Inc., and the Air Transport Association of America (ARINC/ATA), Rockwell International Corporation (Rockwell), and the FAA argue that both GLONASS and GPS operations, as potential components of the GNSS, must be protected during all phases of flight over the United States. To that end, they proffer additional limitations on Big LEO operations. ARINC/ATA argues that the Commission should clarify that the RR 731E limitation of -15 dB (W/4kHz) for MSS mobile terminals should apply only after GLONASS moves to frequencies below 1610 MHz. Until then, they contend, the limit should be -78.5 dB (W/MHz).[156] Similarly, Rockwell states that the RR 731E limit is insufficient for protecting GLONASS operations at 1610-1616 MHz. Rockwell claims that the RR 731E power density level is about 140 dB above the maximum interference level that can be tolerated by a typical GLONASS receiving system. Rockwell asserts that shared use of this band segment is impractical absent significant constraints on either MSS or GLONASS. Therefore, it maintains that MSS operation should not be permitted in the 1610-1616 MHz band segment until GLONASS operations are shifted to frequencies below 1610 MHz.[157] The FAA states that the Commission indicated that use of the 1610-1616 MHz band by MSS is premised upon moving GLONASS below 1610 MHz. It maintains that the e.i.r.p. density specified in RR 731E is too high to protect in-band GLONASS for anything but high altitude enroute communications.[158]

126. Several of the MSS applicants also disagree that more restrictive limits should be placed on MSS uplinks pending a GLONASS frequency shift. Constellation states that more realistic interference criteria and models must be developed before any requirements other than the RR 731E uplink e.i.r.p density limit can be adopted.[159] Ellipsat contends that no additional requirements should be adopted because the aviation community has not provided a legitimate basis for overly stringent requirements on MSS uplinks. Further, Ellipsat maintains that even if GLONASS becomes a component of the GNSS, the aviation community has not provided a showing that GNSS performance would be impaired if degradation were to occur to the small number of GLONASS satellites that would operate above 1610 MHz.[160] Motorola claims that

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[156] ARINC/ATA Comments at 2-3.

[157] Rockwell Comments at 2-3.

[158] FAA Comments at 2.

[159] Constellation Reply Comments at 47.

[160] Ellipsat Reply at 11.

the proposed limits advocated by the aviation community are based on flawed assumptions and unsound analysis. Additionally, Motorola asserts that the protection the aviation parties claim as necessary is based on the erroneous assumption that corrupting a single measurement from a GLONASS satellite will cause unacceptable degradation in the ability to navigate.[161]

127. Several MSS applicants also state that, to afford new MSS systems flexibility in how they protect ARNS/RNSS, the Commission should modify proposed rule Section 25.213(c)(1), which, in addition to the uplink limits contained in RR 731F, requires all MSS operations in the 1.6 GHz band to be coordinated with systems operating pursuant to RR 732. Motorola argues that rules embodied in the international Radio Regulations are adequate for ensuring coordination with and protection of other services.[162] Constellation contends that footnote RR 731E establishes the only enforceable interference criteria (i.e., a maximum e.i.r.p. density of -15 dB (W/4kHz) from MSS transmitters) that can be incorporated into the Commission's rules at this time. Motorola, in contrast, suggests that the e.i.r.p value set forth in Section 25.213(c)(1) be interpreted as a coordination trigger rather than an absolute limit.[163] LQP states that the proposed rule requires MSS systems to protect GLONASS beyond the limits specified in RR 731E.[164]

128. We do not believe it is necessary to protect GLONASS operations beyond the provisions of RR 731E and the obligation to coordinate MSS systems under current International Telecommunications Union (ITU) procedures. RR 731E states clearly that MSS stations shall not cause interference to, nor claim protection from ARNS stations operating in accordance with RR 732. In addition, under ITU Resolution 46, Big LEO licensees would be subject to whatever limits or conditions agreed upon during the coordination process. GLONASS would likely be part of the coordination negotiations. Accordingly, we reject the aviation community's requests that additional limits be placed on MSS operations pending a GLONASS move, particularly absent definitive technical characteristics and requirements of a future GNSS system, and a

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[161] Motorola Reply Comments at 51. Motorola notes that a study conducted for LQP by Sat-Tech Systems demonstrates that loss of a single satellite will never cause a loss of GNSS (LQP Comments at Technical Appendix, para. 2.2.1 at 12). In addition, the Committee performed an analysis of the availability of GNSS satellites if the GLONASS constellation operated only on frequencies below 1610 MHz. It concluded that a minimum of five satellites would always be available for GNSS. In addition, it noted that this minimum would occur for only 14 minutes in every 51-day period. It noted further that since only four GNSS satellites are required for navigation and an additional one satellite to for system integrity, it appeared that GLONASS satellites operating above 1610 MHz might not be required for either navigation or terminal approach communications. Committee Report, note 23, supra at 3.3.4.4.

[162] Motorola Reply Comments at 47.

[163] Motorola Comments at 55.

[164] LQP Comments at 66-67.

definitive statement as to GLONASS's role in the GNSS.[165] Further, imposing additional constraints on Big LEO use of the 1610-1616 MHz band could jeopardize the applicants' ability to implement their systems. This could deprive the United States and those countries who choose to participate in offering services the potential benefits that Big LEOs could bring. Conversely, we do not believe the limits in RR 731E should be relaxed, as Motorola suggests. It is clear -15 dB(W/4kHz) is a limit and not a threshold for coordination. Therefore, we adopt the e.i.r.p. limits embodied in RR 731E in Section 25.213(c)(1) with the requirement that coordination of MSS mobile earth terminals must be undertaken according to the provisions of Resolution 46 (WARC-92).

129. We also adopt our proposed rule that prohibits operation of Big LEO terminals on-board civil aircraft unless the terminal has a direct connection to the aircraft's Cabin Communication System. However, we agree with Constellation and others that this a transceiver operating provision and is not necessarily a sharing requirement. Therefore, since this provision is contained in § 25.136(a) of our rules, it need not be repeated in § 25.213. Consequently, we do not adopt proposed rule § 25.213(c)(2) and refer licensees to § 25.136(a).

b. Out-of-band interference to ARNS/RNSS in the 1559-1610 MHz band

130. Protection of GPS from out-of-band emissions from primary uplinks in the 1610-1626.5 MHz band. The Committee concluded that out-of-band emissions by MSS uplinks in the 1610-1626.5 MHz band could potentially interfere with GPS operations near 1575 MHz. The Committee found, however, that sharing is possible if appropriate limits are put on out-of-band emissions from MSS user transceivers.[166] The Committee recommended, and we proposed, that MSS user transceivers limit out-of-band emissions (for broadband noise emissions) so as not to exceed an e.i.r.p. density of -70 dBW/1MHz averaged over any 20 millisecond (ms) period in any portion of the 1574.397-1576.443 MHz band. For any discrete spurious emissions in the same band (i.e., bandwidth less than 600 Hz), the user transceiver e.i.r.p density is not to exceed -80 dbW.[167]

131. ARINC/ATA agrees that the proposed limits will protect GPS.[168] The FAA, however, recommended that the protection bandwidth for GPS "be established at least 20 MHz

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[165] LQP notes that the FAA has suggested that it is still studying how GLONASS "best fits" a GNSS. LQP Reply at 62.

[166] See Committee Report, note 23, supra, at para. 5.2.2.7

[167] See proposed Section 25.213(b)

[168] See ARINC/ATA Comments at 3

wide, (i.e., 1575.42 +/- 10 MHz)."[169] No technical analysis was provided to support this recommendation.

132. TRW, Ellipsat, and LQP contend that the proposed out-of-band emission limits should be relaxed.[170] They contend that relaxing the limits will allow for reasonably priced user terminals and will adequately protect GPS from out-of-band emissions from these terminals. Constellation, in contrast, supports the proposed limits. It states that the protection level for GPS receivers is reasonable given the frequency separation between the lower end of the MSS band at 1610 MHz and GPS signals at 1575.42 MHz.[171]

133. We believe that the proposed out-of-band emission limits for MSS user transceiver operations in the 1610-1626.5 MHz band are appropriate to protect GPS operations near 1575 MHz. Both the aviation and MSS parties participated in the Committee's deliberations that resulted in a consensus on an out-of-band emission limit for protecting GPS. No party has demonstrated that a modification of those limits is now warranted. The MSS parties do not demonstrate that the limits are overly restrictive or that significant additional costs would be incurred by building transceivers to meet the limits. Similarly, the aviation parties have not shown that additional protection bandwidth for GPS is necessary. We therefore adopt proposed Section 25.213(b) with minor editorial changes.

134. Protection of GLONASS from out-of-band emissions from primary uplinks in the 1610-1626.5 MHz band. The Committee also addressed potential MSS out-of-band interference to GLONASS operations below 1610 MHz, but did not reach a consensus. It did, however, suggest a methodology that could be used to determine appropriate limits. It also noted that there was general agreement that the MSS user transceiver out-of-band emission limits recommended for protecting GPS would be sufficient to protect GLONASS operations below 1610 MHz.[172] We requested comment on the proposed methodology and on the appropriate parameters to be used in developing protection criteria.

135. ARINC/ATA and Rockwell maintain that the MSS out-of-band emission limits appropriate for protecting GPS operations near 1575 MHz should similarly apply to GLONASS operations below 1610 MHz.[173] The FAA suggests an interference threshold of -145 dBW/1MHz

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[169] See FAA Comments at 3.

[170] LQP suggested that the limit be -50 dBW/1MHz averaged over any 20 ms period in any portion of the 1575.42 +/- 1.023 MHz band for broadband noise emissions. LQP Comments at 65. See also TRW Reply at 77 (n. 118), Ellipsat Reply at 11 (n.7)

[171] Constellation Comments at 49.

[172] See Committee Report, note 23, supra, at para. 5.2.2.7

[173] See ARINC and ATA Comments at 3 and Reply at 7; Rockwell Comments at 4.

for GLONASS receivers operating below 1610 MHz and calculates a -71 dBW/1MHz MSS user terminal out-of-band emission limit which, it argues, is necessary to protect GLONASS operations at that particular interference threshold. [174]

136. The MSS applicants question whether the assumptions made by the aviation parties in their analyses are appropriate and disagree that a direct correlation can be made between the out-of-band emission limits necessary for protecting GPS and the limits necessary for protecting GLONASS below 1610 MHz. Constellation, for example, noted that the provisions to protect GPS from MSS out-of-band emissions were agreed to in the Committee, but that agreement was "without prejudice to the application of the interference protection model to any other case, i.e., GLONASS, where it would be impractical to provide this same level of protection and for which other solutions are required to avoid harmful interference."[175] LQP notes that while the FAA, ARINC and ATA seek protection of individual GLONASS signals, they have not provided an analysis of why such protection is required to ensure the integrity of the GLONASS system.[176] Motorola contends that the analyses conducted by the aviation community are "skewed" because they have assumed that the MSS transmitter and the aircraft receiver are static when, in fact, both devices are usually mobile.[177] Motorola also lists a number of factors which it argues would provide a more accurate determination of necessary out-of-band emission limits.[178] TRW requests that we incorporate in the rules the ongoing measurement programs and the system vulnerability analyses now being used to determine actual protection requirements of GNSS.[179]

137. We will not adopt out-of-band emission limits to protect GLONASS operations below 1610 MHz at this time. The Committee did not agree on limits and the record indicates that a suitable methodology for determining such limits has still not been agreed upon. We note, however, that RTCA Working Group SC159 ad hoc has been established to assess interference

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[174] FAA Comments at 3-4.

[175] See Constellation Comments at 49.

[176] See LQP Reply at 60-61. On LQP's behalf, Sat-Tech Systems conducted an independent study of GNSS satellite availability. Sat-Tech Systems concluded that since multiple measurements from a number of GPS and GLONASS satellites would always be available, the loss of a single GNSS signal would not impair the ability to navigate using GNSS. LQP Comments, Technical Appendix at para. 2.2.1.

[177] Motorola Reply at 51.

[178] These include the effects of duty cycle, modulation technique, spectral overlap, channel assignment, airframe shielding, time duration of event, and signal processing. Motorola describes in detail the individual impact of each of these factors on the analyses in its reply technical appendix at 1-10.

[179] See TRW Reply at 77 (n. 118).

to GNSS and possible interference mitigation techniques. The aviation community and the Big LEO applicants participate in this group. We expect that the report from SC159 ad hoc will include an assessment of the out-of-band emission limits on MSS operations necessary to protect GLONASS operations below 1610 MHz. We also believe that this information will provide a mutually acceptable out-of-band emission level.

c. Out-of-band interference to ARNS/RNSS from secondary MSS downlinks in the 1613.8-1626.5 MHz band.

138. The Committee also examined the potential for harmful interference to GPS and GLONASS from secondary MSS downlinks in the 1613.8-1626.5 MHz band. It concluded that interference to GPS operations near 1575 MHz from these downlinks would be negligible due to the low power density level of MSS satellite signals at the Earth's surface and the large frequency separation between the MSS and the GPS frequency bands.[180] To protect GLONASS from interference, however, the Committee recommended that space stations that use the 1613.8-1626.5 MHz-band for downlinks not exceed a pfd of -141.5 dbW/m^2/4kHz.[181] We proposed this limit in the Notice in rule Section 25.213(c)(3).

139. Motorola requests that we limit proposed Section 25.213(c)(3) to apply only to those frequencies that are used by systems operating in accordance with International Radio Regulation RR 732. Motorola contends that this would "follow any changes in the frequency plan of systems, like GLONASS, operating in accordance with RR 732, and would also avoid restricting the operations of MSS systems in frequencies where there are no aeronautical radionavigation systems and hence no need for a more restrictive power flux density limit."[182] Motorola also asks us to clarify that the pfd limit refers to the pfd level at the Earth's surface.

140. We believe that the pfd limits proposed in Section 25.213(c)(3) can be readily achieved by MSS operators using the 1613.8-1626.5 MHz band for secondary downlink transmissions. We also believe that our intra-service sharing plan provides sufficient separation between the MSS downlink band and GLONASS operations below 1610 MHz so as not to create interference. Nevertheless, we have decided not to adopt the proposed rule containing out-of-band emission limits for secondary MSS downlinks. Adopting such a rule could be construed to imply that the secondary service has some protection rights relative to primary services in the band, which, by definition, it does not.[183]

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[180] Committee Report, note 23, supra, at para. 3.3.8

[181] Committee Report, note 23, supra, at para. 5.2.2.6.

[182] See Motorola Comments at 56.

[183] See note 21, supra.

141. We remind MSS operators that plan to use the 1613.8-1626.5 MHz secondary allocation for MSS space-to-Earth operations that downlink MSS operations shall not cause harmful interference to GLONASS operations in the 1598-1610 MHz band.[184] Further, MSS operators may not claim interference protection from out-of-band GLONASS operations. We also remind MSS operators of the obligation to coordinate secondary downlink operations in the 1613.8-1626.5 MHz band pursuant to RR 731F.[185]

3. Industrial, Scientific, and Medical Emissions at 2400-2500 MHz

142. The 2400-2500 MHz band may be used on a co-primary basis for Industrial, Scientific and Medical (ISM) equipment applications. ISM applications include microwave ovens, door openers, high frequency lighting systems, industrial equipment, and other low power devices. The Committee was unable to reach a consensus as to whether ISM use represents a significant interference problem to MSS downlinks at 2483.5-2500 MHz.[186] In the Notice, we stated that the record in this area was insufficient to propose specific MSS/ISM sharing rules and requested additional comment on this subject.[187]

143. In their comments, LQP and TRW indicate they conducted independent analyses of the potential for ISM operations to cause harmful interference to 2.4 GHz MSS downlinks. LQP concluded that MSS user transceivers operated in an urban environment with full signal quality in 98% of the instances it recorded. Further, it concluded that MSS signals would be usable 99.5% of the time. LQP also noted that because urban areas are usually served by terrestrial cellular networks, a dual mode transceiver could be switched to terrestrial cellular frequencies when very high ISM interference is present.[188] TRW states that its study generally corroborates LQP's conclusion that 2.4 GHz MSS operations should not be adversely affected by ISM transmissions.[189]

144. Consequently, we do not believe any further inquiry into the MSS/ISM sharing situation is warranted. Should sharing be more difficult than anticipated, affected parties may request that we revisit this matter.

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[184] See note 21, supra.

[185] See Section 2.106 of the Commission's Rules.

[186] Committee Report, note 23, supra, at 3.4.9.

[187] Notice, note 2, supra, at para. 67.

[188] LQP Comments, Technical Appendix at 32.

[189] TRW Reply Comments at 86. In earlier comments, TRW suggested that the Commission reassess the permissible levels of unwanted ISM emissions in order to maximize sharing possibilities.

4. Sharing with Fixed Services in the 2483.5-2500 MHz band

145. Over 700 fixed terrestrial stations, including temporary fixed (transportable) stations, are licensed and operating in the United States in the 2483.5-2500 MHz band. These stations are primarily used as links in microwave relay systems serving petroleum companies and as broadcast auxiliary links. Since 1985, however, the Commission has prohibited any further terrestrial licensing in this band.[190]

146. The Committee recognized that MSS spacecraft operating at power flux density (pfd) levels in excess of the levels prescribed by international radio regulation RR 2566 would be required to be coordinated with these "grandfathered" fixed terrestrial stations.[191] It stated, however, that these cases should be infrequent and that, in any event, any interference problems should be resolvable through coordination. The Committee also noted that terrestrial operations could interfere with MSS operations, although no analyses were provided to quantify the sharing constraints needed to prevent such interference. The Committee stated that because there is no inherent reason why fixed services need to continue operating in this frequency band, the Commission should consider moving these fixed stations to a higher frequency band.

147. In the Notice, we accepted the Committee's finding that interference problems between terrestrial fixed-services at 2483.5-2500 MHz and MSS downlinks operating in excess of the prescribed pfd levels may be settled through the coordination process.[192] We requested comment on this assessment. We also specifically requested comment from terrestrial operators, who did not participate in the Negotiated Rulemaking.

148. In the RDSS Allocation Order, we recognized that fixed and temporary-fixed operations are unlikely to pose a serious interference threat to RDSS.[193] We therefore grandfathered all existing station licenses as of July 25, 1985, permitting them to continue operations and subject only to license renewal. However, we acknowledged that coordination would be somewhat more difficult when temporary-fixed stations are involved since RDSS licensees would not have exact information regarding the location of these stations. Therefore, we required temporary-fixed licensees in this band to notify RDSS licensees directly whenever

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[190] Report and Order, Gen. Docket 84-689, FCC 85-388 (released Sept. 13, 1985) (RDSS Allocation Order).

[191] RR 2566 specifies pfd values at the Earth's surface that may be produced by space station emissions. The values vary from -152 to -142 dB ($W/m^2/4$ kHz) depending upon the angle of arrival. International radio regulation RR 753F incorporates these limits. According to RR 753F, if the limits of RR 2566 are exceeded by the MSS, coordination with terrestrial services is required.

[192] Notice, note 2, supra, at para. 62.

[193] See RDSS Allocation Order, note 190, supra, at paras. 18-20.

the station is moved to a new location.[194] A similar interference environment is present with MSS operations. Consequently, we proposed to modify Section 94.61(b)(4) to extend the notification requirement for grandfathered temporary-fixed licensees to MSS licensees as well.[195]

149. The Big LEO parties argue that the Commission should adopt pfd limits for MSS transmissions that are less stringent than those of RR 2566 and that these limits should be implemented as "triggers" for coordination, not as "absolute limits."[196] This would work in the following manner: the relaxed pfd limit would be established as a "trigger level." If the trigger level is not exceeded, no further action would be required. If the trigger level is exceeded, the interference level to terrestrial systems would then be examined, taking into account the individual system characteristics of the MSS system. Only if the protection levels of the second step are exceeded would coordination be required.[197] According to the Big LEO parties, relaxing the pfd levels and applying the coordination trigger method would enable the MSS systems to enhance capacity and sharing with other MSS operators and avoid time-consuming and costly coordination.[198]

150. We adopt the pfd threshold of RR 2566 for our domestic Big LEO systems. The ITU Radiocommunication Study Group, Task Group 2/2 (TG 2/2), is studying the issue of relaxing the pfd limits of RR 2566, with the view to present a recommendation at an upcoming World Radiocommunication Conference (WRC). The Commission participates actively in the work of TG 2/2. We do not believe it would be appropriate to adopt an increase in the allowable pfd limits for MSS downlinks in the 2483.5-2500 MHz band in the United States before limits are agreed upon internationally. Indeed, even if we adopted a relaxation of the RR 2566 pfd limits in the United States, it is questionable whether MSS systems that are not designed for power controlled downlink transmissions would be able to take advantage of this relaxed limit worldwide.

151. We also adopt the notification requirement for grandfathered temporary-fixed licensees to MSS licensees as proposed in the Notice and will not require these stations to relocate. No comments were filed with respect to a possible relocation of grandfathered

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[194] See 47 C.F.R. § 94.61(b)(4).

[195] Notice, note 2, supra, at para. 62 (n. 104). See also Allocation Order, note 1, supra (modifying NG 147 to the Table of Frequency Allocations, 47 C.F.R. § 2.106, to recognize that "grandfathered" terrestrial stations may continue to operate on a primary basis with the MSS.)

[196] LQP Comments at 75, Ellipsat Reply Comments at 24, TRW Reply Comments at 78.

[197] LQP Comments at 77, TRW Comments at 131.

[198] We note also that LQP has, in a separate proceeding, recommended that these limits be raised. LQP Comments at 74; see Petition for Clarification and Partial Reconsideration of Loral Qualcomm Satellite Service, Inc., ET Docket No. 92-28 at 7-10 (filed Mar. 30, 1994).

terrestrial stations. We therefore have no record in this proceeding on which to base a finding that a move would serve the public interest.

5. Fixed Services above 2500 MHz (ITFS/MMDS)

152. The instructional television fixed service (ITFS) and the multi-channel multipoint distribution service (MMDS) operate in the adjacent 2500-2690 MHz frequency band. The Committee found a potential for out-of-band emission interference into MSS downlinks at 2483.5-2500 MHz from operations in the lowest frequency portion of the ITFS/MMDS allocation. It indicated that because both ITFS and MMDS transmissions are similar to those of television broadcast signals, they will cause harmful interference into MSS mobile user transceivers operating up to several kilometers away from an ITFS or a MMDS transmitter. The Committee concluded that stricter limits on ITFS and MMDS out-of-band emissions should be imposed, and recommended that the Commission initiate such a rulemaking.[199] It acknowledged, however, that making these improvements would cost up to $30,000 per ITFS or MMDS station, and that this cost might increase if these stations are converted from analog to digital technology.

153. We stated in the Notice that the record was insufficient to allow us to make a specific proposal in this area.[200] No ITFS representative participated on the Committee nor did the Committee explore the economic and technical tradeoffs that must be considered in developing a solution. Therefore, we requested comment on all aspects of the ITFS/MSS sharing issue, noting that the regulations we ultimately adopt would be based on these comments. We noted that these regulations might require ITFS operators to improve out-of-band suppression, might require MSS operators to accept additional interference, or might require a combination of both.

154. Ellipsat and TRW contend that new out-of-band emission constraints on all ITFS/MMDS stations should be applied immediately to allow for a transition period for these transmitters to conform to new requirements and that, according to Section 74.936 of the Commission's Rules, the "onus is on the ITFS operator to provide the required interference

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[199] Specifically, the Committee concluded that out-of-band emissions from the lowest frequency ITFS/MMDS channel using an analog video signal at 2500-2506 MHz should be limited to -90 dB relative to the carrier at a frequency offset from band edge between 1.25 and 2 MHz, assuming that the channel is operating at 30 dBW e.i.r.p. Adjustments could be made for higher frequency channels and for higher or lower operating e.i.r.p. Currently, ITFS out-of-band emissions extending more than 1 MHz below the lower band edge must be attenuated 60 dB below the peak visual carrier power. See 47 C.F.R. § 74.936(b).

[200] Notice, note 2, supra, at para. 64.

protection to adjacent band services."[201] Further, TRW asserts the licensing of Big LEO systems or the initiation of service should not be delayed to permit ITFS operators additional time to modify their transmitters.

155. The Wireless Cable Association International (WCAI), the National Telephone Cooperative Association (NTCA) and the Corporation for Public Broadcasting (CPB), urge that the Commission adopt rules that will provide adequate compensation to ITFS/MMDS operators for costs associated with improving their transmitters to comply with any stricter out-of-band emission requirements.[202] WCAI also notes that broadband repeaters used by some ITFS and wireless cable system operators to relay signals into areas that would otherwise be unreachable could pose a threat to MSS downlink operations at the upper portion of the 2483.5-2500 MHz band.[203]

156. LQP, in contrast, does not believe that interference is a significant problem. It conducted a study to assess the impact of ITFS/MMDS out-of-band interference to MSS downlinks in the 2483.5-2500 MHz band and concluded that no harmful interference to MSS operations will result from ITFS/MMDS, including operations of ITFS/MMDS booster stations, and that stricter standards on ITFS/MMDS out-of-band emissions are not necessary. LQP maintains that: 1) MSS downlink operations below 2488.75 MHz will not experience interference from ITFS stations, 2) in urban areas, where ITFS transmitters are prevalent, MSS dual mode transceivers can be used to switch customers to existing terrestrial cellular radio facilities, and 3) MSS user transceivers operating in the highest channel frequency in the 2483.5-2500 MHz band within an ITFS coverage area will be able to operate satisfactorily in all but a few extreme situations by rejecting the ITFS visual carrier and other out-of-band emissions.[204]

157. TRW urges that the LQP study "may have taken an overly optimistic view of the interference situation."[205] TRW also contends that MSS systems using wider CDMA channels (e.g., 5 MHz or wider) may not have the flexibility to move to a lower frequency channel and

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[201] TRW Comments at 132, Ellipsat Reply Comments at 24. Section 74.936 of the Commission's rules, which pertains to ITFS facilities, states that "should interference occur as a result of emissions outside the assigned channel, additional attenuation may be required." 47 C.F.R. § 74.936.

[202] WCAI Comments at 3 and 6, NTCA Comments at 2-3, and CPB Comments at 6.

[203] WCAI Comments at 4.

[204] LQP Comments, Technical Appendix, at 27.

[205] TRW Reply Comments at 79.

that until further required measurements are taken and MSS system designs are finalized, the impact of ITFS/MMDS out-of-band interference is not certain.[206]

158. Upon review of the technical information in the record, we see no significant threat of harmful out-of-band emission interference into MSS from ITFS/MMDS operations above 2500 MHz. Well designed CDMA receivers should mitigate the effect of out-of-band emissions from ITFS/MMDS. Additionally, a MSS user transceiver's dynamic channel switching capability should reduce any adverse affects from ITFS/MMDS. Further, our intra-service sharing plan allows enough 2.4 GHz band spectrum for MSS operators to avoid ITFS/MMDS out-of-band emissions in the upper portion of the allocation. Consequently, we will not initiate a proceeding to restrict further the out-of-band emissions on ITFS/MMDS at this time.

6. Other Terrestrial Services provided outside of the United States

159. In sixteen countries throughout the world, the 1550-1645.5 MHz band is allocated on a primary basis to the fixed service pursuant to international Radio Regulation RR 730.[207] Ground-based aeronautical radionavigation services (ARNS) are also operating throughout the world in the 1610-1626.5 MHz band pursuant to RR 732.

160. The Committee concluded that existing fixed stations operating in the 1610-1626.5 MHz band pursuant to RR 730 and ground-based ARNS stations operating pursuant to RR 732 will not cause harmful interference to MSS operations. It also concluded that MSS operations will not cause harmful interference to these terrestrial services. Consequently, we proposed only to reiterate in Section 25.213(d) of our rules the general obligation that MSS stations shall not cause interference into stations operating under RR 730. The requirement that MSS stations shall not cause interference to, or claim protection from, stations operating pursuant to RR 732, (international Radio Regulation RR 732 encompasses both ground-based and satellite-borne ARNS), was addressed by proposed rule section 25.213(c)(1), which was adopted earlier in this order.[208]

161. Constellation contends that we should not adopt proposed Section 25.213(d) since there are no U.S. systems operating pursuant to RR 730.[209] We disagree. We have repeatedly emphasized in this proceeding that the operation of LEO MSS systems is inherently global. Though there are no systems operating in the United States pursuant to RR 730, it is important

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[206] TRW Technical Appendix to Reply Comments at A-24.

[207] These countries are Austria, Bulgaria, Cameroon, Germany, Guinea, Hungary, Indonesia, Libya, Mali, Mongolia, Nigeria, Poland, Romania, Senegal, Czechoslovakia, and the former U.S.S.R.

[208] See para. 128, supra.

[209] Constellation Reply Comments at 47 and Constellation Comments at 53.

that we make clear the obligations of Big LEO operators to coordinate their systems worldwide. Our rules do not elsewhere address coordination of Big LEO systems with systems operating pursuant to RR 730.

162. We therefore adopt Section 25.213(d), as proposed, with the caveat that the coordination and notification procedures fall under Resolution 46 (WARC-92).[210] International Radio Regulations RR 731E and RR 731F require, respectively, that MSS uplink transmissions in the 1610-1626.5 MHz band and MSS downlink operations in the 1613.8-1626.5 MHz band be coordinated and notified pursuant to Resolution 46 (WARC-92). Also according to RR 731E, MSS mobile earth terminals may not cause interference to terrestrial stations operating in accordance with RR 730 and they may not claim interference protection from these terrestrial stations. We note that all transmitting MSS subscriber terminals will be subject to the regulatory requirements of those countries in which they are operating. User countries will be responsible for undertaking all necessary coordination with neighboring countries to protect fixed or terrestrial aeronautical radionavigation operations from MSS mobile earth terminals in those neighboring countries. Any secondary MSS downlink operations in the 1613.8-1626.5 MHz band also may not cause harmful interference into terrestrial services operating pursuant to RR 730 or 732. Nor may a MSS mobile earth terminal which receives secondary downlink transmissions claim protection against harmful interference from these terrestrial operations unless a particular country has agreed to provide this protection.

C. Feeder Links

163. In addition to the mobile links connecting customers with the MSS system, one or more "gateway" or central earth stations are needed to complete the transmission paths, process the information being transmitted, and interconnect the system with other communications networks or with other user transceivers. Without these "feeder links," an MSS system would be useless. Because feeder links operate with gateway stations at fixed locations, the feeder link operates in frequency bands allocated to the fixed-satellite service (FSS).

164. The six applicants requested a variety of feeder link frequency bands and bandwidths. In their applications, Constellation, Ellipsat, and LQP each requested 66 MHz of spectrum in each transmission direction in the 5/6 GHz C-band. Motorola and TRW each requested approximately 100 MHz in each direction in the 20/30 GHz Ka-band. AMSC requested an unspecified amount of spectrum in the 12/14 GHz Ku-band.[211] We note, however, that four of the applicants, in the Joint Proposal, indicate that their feeder link spectrum requirements have increased significantly since they filed their original applications. As recognized in the Notice, the FAA has opposed use of the 5 GHz portion of the C-band for space-to-Earth feeder links because of the interference potential between the feeder links and a

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[210] See Motorola Comments at 56.

[211] Committee Report, Annex 3, Report of Working Group 3, at 2.

navigation system it is considering developing in this band.[212] The 27.5-29.5 GHz portion of the Ka-band was the subject of a recently completed Negotiated Rulemaking involving various terrestrial and satellite interests seeking to use the band. The Negotiated Rulemaking Committee was unable to devise sharing criteria that would satisfy the feeder link requirements of more than one Big LEO applicant.

165. In the Joint Proposal, the parties nevertheless request the Commission to proceed with licensing. They state that licenses can be issued to those applicants requesting to operate in feeder link bands that are available for assignment at the time of licensing. They suggest that conditional licenses be awarded to applicants requesting to operate in feeder link bands that are not available. According to the parties, the license would contain a range of feeder link frequencies that the licensee will be able to use provided that those frequencies become available for Big LEO feeder links and are assigned to that licensee by the Commission.

166. We agree that we should award Big LEO licenses as quickly as possible. While we are optimistic that sufficient spectrum will be identified to support Big LEO feeder link operations, we are not certain when this will occur. It is very likely that we will not be in a position to assign specific feeder link spectrum to any qualified applicant by our target date for licensing in January 1995. Even if we were able to assign specific feeder link spectrum to some, however, we would not issue unconditional grants to some and conditional grants to others as the applicants suggest. Until we are certain that the feeder link requirements of all qualified applicants will be met, we will not foreclose our options by assigning spectrum unconditionally.[213] We will permit applicant to notify us whether they would prefer to have conditional feeder link frequencies included in their authorizations or whether they would prefer their initial license to be silent on this issue. We envision granting unconditional licenses, including specific feeder link frequencies, at the earlier of two events: (1) domestic allocations sufficient to support all Big LEO systems are available, regardless of frequency band or (2) the completion of the upcoming World Radio Conference in the Fall of 1995 (WRC-95) assuming sufficient spectrum is made available to satisfy these feeder link requirements. If sufficient feeder link spectrum to support all licensed Big LEO systems is not identified by the completion of the WRC, we will need to develop a further processing mechanism to assign feeder link bands to Big LEO licensees. In the interim, we will continue our international efforts to identify feeder link spectrum at or below 15 GHz.

167. To this end, in preparation for the WRC, ITU-Radiocommunications Study Group Task Groups 8/3 and 4/5 are attempting to define spectrum requirements, to identify available frequencies and to evaluate sharing possibilities with existing and future users of the band. When

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[212] See Notice, note 2, supra, at para. 75.

[213] We will, however, take action on requests for waiver of the construction permit requirement under Section 319(d) of the Communications Act, 47 U.S.C. § 319(d). If an applicant's waiver request were approved, it would permit the applicant to commence construction of its system, including the feeder links, at the applicant's own risk.

these Groups complete their work in December of this year, both will prepare Reports to the Conference Preparatory Meeting (CPM)-95. These Reports will form the basis for the CPM's Report to WRC-95 on feeder links, which will be the technical basis for international decisions regarding feeder links and the International Table of Allocations.

168. Since the frequencies to be used for LEO feeder links may also be used by GSO satellites, Task Group 4/5 is studying the sharing potential between LEO and GSO satellites in all FSS allocations between 3 and 31 GHz. These studies have indicated that certain FSS frequency bands are used more extensively by GSO FSS systems and other radio services and that these bands are therefore less likely candidates for LEO MSS feeder links due to sharing difficulties. In bands at or below 15 GHz, the 5000-5250 GHz and 15.4-15.7 GHz frequencies appear to be promising candidates for reallocation for LEO feeder links.[214] Task Group 4/5 has also studied the interference created by antenna beam coupling between GSO earth stations and LEO satellite stations,[215] and is exploring ways to reduce interference through a variety of coordination procedures, including geographic exclusion zones, reverse band operation, and dedicated frequency allocations for LEO satellite feeder link use. When these studies are completed, we will have an indication as to which bands may be recommended and, hopefully, made available internationally for MSS feeder links at WRC-95.

169. Nevertheless, as we stated in the Notice, we will not allow the uncertain availability of bands below 15 GHz to delay the licensing and implementation of Big LEO systems. Consequently, if sufficient spectrum is made available at 20/30 GHz to accommodate all Big LEO licensees before bands below 15 GHz are identified, we will authorize all licensees in the 20/30 GHz band, recognizing that several applicants will be faced with substantial system design and service concept modifications. We will continue, however, to pursue bands at and below 15 GHz for Big LEO feeder links, and will allow licensees to modify their licenses to request operational authority in any new bands if, and when, they become available.

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[214] Task Group 4/5 forwarded a preliminary study to TG 8/3 that identified the 5000-5250 GHz and 15.4-15.7 GHz bands as strong candidates for Non-GSO Earth-to-space feeder links. The study indicated that TG 4/5 was of the preliminary view that sharing of non-GSO feeder links (both downlinks and uplinks) with Aeronautical Radionavigation Services (ARNS) in these bands appeared feasible, since the interference to microwave landing system (MLS) receivers would be within the assumed permissible levels. ICAO, at Task Group 8/3, objected to this study, but further analysis is underway and the bands are still being considered as possibilities within these international forums.

[215] Antenna beam coupling occurs when a LEO satellite passes below a GSO satellite and crosses into the transmission path of an earth station to the GSO satellite. At that point, the transmission beams from the LEO satellite and the earth station will intersect. If the LEO and GSO systems are operating in the same frequency band, this "coupling" will produce significant interference for very short durations of time when the earth station, LEO and GSO satellites form a straight line.

D. Intersatellite Links

170. Motorola's proposed system includes intersatellite transmission links in the 23.18-23.38 GHz band. This proposal falls within the intersatellite service allocation at 22.55-23.55 GHz. The Committee concluded that Motorola's use of this band would be compatible with other operations in the band, which include operations by NASA, the radio astronomy service, and fixed-terrestrial services. The Committee noted, however, that NASA has indicated it would prefer that any future MSS intersatellite links operate in the 24.45-24.75 GHz band, which recently was allocated internationally and domestically for intersatellite links. Nevertheless, the Committee, which included a representative of NASA, proposed that we adopt a rule indicating that the 22.55-23.00 GHz, 23.00-23.55 GHz, 24.45-24.65 GHz, and 24.65-24.75 GHz frequencies are available for use by the intersatellite service. In the Notice, we proposed to adopt the Committee's recommended rule regarding intersatellite service frequencies, coordination with government agencies, and sharing criteria. We adopt the rule as proposed with several minor changes and clarifications suggested by Motorola.

E. Service Rules

1. Regulatory Treatment

171. In the Notice, we asked parties to comment on our tentative conclusion that Big LEO MSS service may be offered as a commercial mobile radio service (CMRS). We further sought comment on whether we should exercise our discretion under Section 332(c)(5)[216] to determine that Big LEO space station licensees making satellite capacity available to CMRS providers shall be required to operate as common carriers. In the alternative, we asked parties to comment on how we should regulate Big LEO space station operators if they are not offering CMRS. We noted that when making determinations regarding common carriage obligations in the past, the Commission has examined individual service proposals in light of the criteria delineated in National Association of Regulatory Utility Commissioners v. FCC, 525 F.2d 630, 642 (D.C.Cir.), cert. denied, 425 U.S. 999 (1976) (NARUC I).[217] Referencing the two-pronged test in NARUC I, in the Notice, we requested comment regarding (1) the likelihood that space station capacity in this service will be offered indifferently to the public, and (2) if there is no such likelihood, whether there should be a legal compulsion for space segment providers to serve the public indifferently.[218] We also asked for comment on the impact of requiring common

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[216] Section 332(c)(5) reads as follows: "SPACE SEGMENT CAPACITY. Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage." 47 U.S.C. § 332(c)(5).

[217] Notice, note 2, supra, at para. 80.

[218] Id. at paras. 80-81.

carrier operation on the amount of foreign investment and the international coordination of these satellites, given the requirements of Section 310(b) of the Act.[219]

172. In a recent rulemaking, we determined the classification and regulatory treatment of providers of CMRS.[220] Regarding satellite services, we held that, to the extent that a space station licensee provides a service that meets the elements of the CMRS definition,[221] we will generally regulate the provision of that service on a common carrier basis.[222] We concluded, however, that so long as the service provider is not providing service directly to end users, the Commission retains the authority under Section 332(c)(5) to continue to employ its existing procedures to determine whether the provision of space segment capacity by satellite licensees to CMRS providers will be offered on a common carrier or private carrier basis.[223] We also determined that the Commission has the discretion to extend this treatment to any entity that sells or leases space segment capacity, to the extent that the entity is not providing CMRS directly to end users.[224]

173. Motorola and LQP agree that the Commission must regulate Big LEO space station licensees as common carriers to the extent that they provide CMRS to end users.[225] If the licensees offer only space segment capacity to resellers, however, the parties contend that this provision of service does not fall within the definition of CMRS, and therefore need not be made

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[219] Id. at para. 81.

[220] Implementation of Sections 3(n) and 332 of the Communications Act, 9 FCC Rcd 1411 (1994) (CMRS Second Report and Order), recon. pending.

[221] Id. at 1457-58. A commercial mobile radio service is defined as "any mobile service (as defined in section 3(n)) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission." 47 U.S.C. § 332(d)(1). A private mobile radio service is defined as "any mobile service (as defined in section 3(n)) that is not a commercial mobile service or the functional equivalent of a commercial mobile service, as specified by regulation by the Commission." 47 U.S.C. § 332(d)(3).

[222] It should be noted, however, that we have chosen to forbear (pursuant to Section 332(c)(1)(A)) from the application of certain provisions of Title II of the Act with regard to CMRS providers. As such, for example, CMRS providers are not permitted to file tariffs for their services. See CMRS Second Report and Order, note 220, supra, at 1478-80.

[223] Id. at 1457-58.

[224] Id. at 1457.

[225] Motorola Comments at 67-68.

available on a common carriage basis.[226] LQP argues that in this situation, the public is assured common carriage access to the service because, at some point a reseller will meet the definition of a CMRS provider and will be required to operate as a common carrier.[227]

174. Big LEO space station licensees providing service directly to end users must be regulated as common carriers if the service offering meets the definition of CMRS. We will determine whether a service offering meets that definition based on the service description contained in the operator's application. Operators with pending applications may amend their applications to the extent necessary to enable us to make the determination regarding the nature of the service.[228]

175. Pursuant to Section 332(c)(5), however, if space segment capacity is offered by a Big LEO space station licensee to a reseller or other entity who then offers CMRS to end users, we have the discretion to determine whether to require the Big LEO licensee to offer such service on a common carriage basis, or to permit such offering to be made on a private carriage basis. In making this determination, we have looked to the analysis enunciated in NARUC I.

176. Regarding the first prong of the NARUC I test, the commenters agree unanimously agree that nothing in the nature of the applicants' service proposals supports a conclusion that their services will be offered indifferently to the public. Motorola points out that it and the other applicants propose to market their space segment capacity to a small number of resellers, and to tailor these offerings to the individual requirements of these few customers. Motorola contends that such offerings have never been viewed as "common carriage" under the NARUC I standard.[229] Constellation, LQP, TRW, and AirTouch concur, noting that Commission has historically viewed a service provider's lack of intent to serve end users as an indication of non-common carriage.[230]

177. We agree with the commenters that the record in this proceeding does not support a finding that the proposed space segment services are likely to be offered to the public

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[226] See, e.g., TRW Comments at 153-54 & n.239; LQP Comments at 97-98.

[227] LQP Comments at 97, 100.

[228] See para. 2, supra.

[229] Motorola Comments at 64-65 (asserting that space capacity on the IRIDIUM system will never be offered directly to the public; rather, it will be provided on a wholesale basis to the operators of the IRIDIUM system gateways, who in turn may provide services to end users or sell capacity in bulk to service providers, or both).

[230] Constellation Comments at 60; LQP Comments at 97-98; TRW Comments at 158-160; Airtouch Comments at 9-10.

indifferently, a basic characteristic of common carrier service.[231] First, in cases where licensees have not intended to serve the user public directly, the Commission has found services to be non-common carrier in nature. In Domestic Fixed-Satellite Transponder Sales, for example, the Commission noted the slim likelihood that non-common carrier domestic satellites would hold themselves out indifferently to serve the user public as key to its decision to permitted qualified persons to apply for domestic satellite licenses for non-common carrier purposes.[232] More recently, the Commission, in assessing its discretion under Section 332(c)(5), held that non-voice, non-geostationary (NVNG) MSS space station licensees would be permitted to provide system access to CMRS providers on a non-common carrier basis.[233] Second, these limited offerings will be tailored to provide resellers with a wide variety of options, ranging from position determination and data messaging services, such as those proposed by the NVNG MSS proponents, to global telephony. Consequently, there is nothing in this record to support a finding that the services will be offered indifferently to the public.

178. Regarding the second prong of the NARUC I test, the commenters unanimously agree that there should be no legal compulsion for space segment providers to serve the public indifferently. AirTouch and other commenters allege that there will be significant competition in the provision of these services to CMRS providers, both from Big LEO systems, as well as from GSO MSS and NVNG MSS systems.[234] These commenters also assert that sufficient capacity will be available to assure service availability to those that wish to receive it.[235] TRW further contends that the danger of unreasonable or anticompetitive practices that common carrier regulation is designed to prevent will not exist in the competitive environment in which Big LEO licensees will operate because five applicants seek authority to operate these services.[236]

179. We concur that there does not appear to be a need to impose common carrier requirements on Big LEO licensees at this time. The Commission has found the presence of capacity and the resulting competition to be an important factor in determining whether non-

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[231] See para. 171, supra. See also Motorola Comments at 64.

[232] Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238, 1256-57 (1982), aff'd, Wold Communications, Inc. v. FCC, 735 F.2d 1465 (D.C.Cir. 1984), modified Martin Marietta Communications Systems, Memorandum Opinion and Order, 60 Rad.Reg. (P&F) 2d 779 (1986).

[233] NVNG MSS Order, note 48, supra, at 8456.

[234] See, e.g., Airtouch Comments at 7-8; Ellipsat Comments at 46; TRW Comments at 156-157.

[235] Airtouch Comments at 8; TRW Comments at 157; Ellipsat Comments at 46.

[236] See TRW Comments at 156. See also Motorola Comments at 63.

common carrier treatment should be permitted.[237] As the commenters state, competitive voice mobile services already exist or are imminent. Furthermore, satellite-delivered radiolocation and messaging services are currently provided by a Commission licensee,[238] and are proposed by a number of NVNG MSS applicants.[239] Moreover, under our rules adopted today, sufficient spectrum is available to support the grant of up to five of the pending Big LEO applications.[240] Thus, significant direct competition is approaching.[241] We accordingly believe that sufficient competitive capacity will be available to assure the public of ample access to these services. Therefore, we find that there is no reason to require the provision of space segment capacity to be offered to resellers on a common carrier basis.[242] Of course, if a space segment capacity provider chooses to provide service on a common carrier basis, that service provider would be

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[237] Domestic Fixed-Satellite Transponder Sales, note 232, supra, at 1250-53.

[238] See Qualcomm, Inc., Application for Blanket Authority to Construct and Operate a Network of 12/14 GHz Transmit/Receive Mobile and Transportable Earth Stations and a Hub Earth Station, 4 FCC Rcd 1543 (1989).

[239] Final rules have been adopted establishing the NVNG mobile-satellite service, and three applications are pending. See NVNG MSS Order, note 48, supra.

[240] See paras. 44-45, supra.

[241] There is also support in antitrust law and policy for examining potential competition for that purpose. See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, Amendment of Part 90 of the Commission's Rules To Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and 935-940 MHz Band Allotted to the Specialized Mobile Radio Pool, GN Docket No. 93-252, PR Docket No. 93-144, PR Docket No. 89-553, FCC 94-212, at paras. 69-70, (released Sept. 23, 1994).

[242] We emphasize that our decision with regard to the regulatory status of the provision of space segment capacity is taken pursuant to the Commission's authority under Section 332(c)(5). Therefore, our actions here should not be viewed as altering our decision in the CMRS Second Report and Order regarding individualized or customized service offerings made by CMRS providers to individual customers. As we explained in the CMRS Second Report and Order, individualized or customized offerings will be classified and regulated as CMRS, regardless of whether such offerings would be treated as common carriage under existing case law, if the service falls within the definition of CMRS. See CMRS Second Report and Order, note 220, supra, at 1439 and n.130. We also explained that the public availability prong of the CMRS definition is met unless the service is used for a licensee's internal use or if Commission rules limit eligibility to specified user groups. Id. at 1441.

subject to regulation as a CMRS provider.[243] The Commission has forborne from applying certain provisions of Title II to CMRS providers.[244]

180. In so finding, we recognize that the commenters argued the imposition of common carrier requirements may have an adverse effect on the development of this service. AirTouch and others argue that Section 310(b) restrictions on foreign involvement in the affairs of domestic common carrier licensees may significantly hinder investment by foreign entities, as well as their willingness to allow a U.S. licensee to operate within their own borders.[245] The commenters allege that this investment is critical to the development of a global satellite service.[246] Further, Motorola states that the submission of U.S. service providers to common carrier requirements will inhibit their ability to compete with foreign systems that are not similarly encumbered.[247] LQP concurs, noting that the space station licensees should be free to tailor their business plans to their respective customer bases.[248]

181. While we have already found that common carrier requirements need not be imposed on space segment operators providing service to resellers, there are several other factors that militate against the imposition of common carrier requirements, particularly those limiting alien ownership under Section 310(b) of the Communications Act. Specifically, these systems are inherently global, and extremely expensive. Systems may be comprised of as many as 66 satellites, only a small number of which are visible over the United States at any one time. Because of their global nature, many systems are raising capital in international markets.[249] As such, it is reasonable to expect that investors will want to be involved with system operation, particularly if the system will be accessed from the investor's jurisdiction. We concur that this foreign participation is likely to improve the likelihood of receiving a grant of space station access by foreign administrations.

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[243] See CMRS Second Report and Order, note 220, supra, at 1475-90.

[244] See 47 CFR § 20.15.

[245] See Airtouch Comments at 4-7. See also TRW Comments at 161-163.

[246] See Ellipsat Comments at 46; Airtouch Comments at 5-6; Motorola Comments at 66-67.

[247] Motorola Comments at 66-67.

[248] LQP Comments at 99.

[249] See, e.g., Motorola Comments at 67; TRW Comments at 161-162 (noting that global geostationary satellite systems, like Panamsat, also have found it necessary to form partnerships with foreign companies in order to raise foreign capital).

2. System License and License Term

182. As proposed in the Notice, and unanimously endorsed by the parties, we will follow the policy we established in licensing NVNG MSS systems, which are also composed of constellations of technically identical LEO satellites. Specifically, we will issue a single "blanket" authorization for the construction, launch, and operation of all the satellites in an entity's constellation. This authorization will cover all construction and launches necessary to put the complete constellation into place and to maintain it until the end of the license term, including any replacement satellites necessitated by launch or operational failures, or by the retirement of satellites prior to the end of the license period. All replacement satellites, however, must be technically identical to those in service and may not cause a net increase in the number of operating satellites.[250] This blanket authorization will include any in-orbit spares for which the applicant seeks authorization as part of its system. Any such spares can be activated as required. Within ten days of activation, the licensee must certify to the Commission that the activation did not cause it to exceed the total number of operating satellites for which its system is authorized. Any spares or replacements that do not fall under the blanket authorization will need separate authorizations to build, launch and operate, but their terms will expire concurrently with the blanket authorization. As proposed in the Notice, the license will run from the date on which the first space station in the system begins transmissions and will be valid for a ten-year period.

183. Some applicants urge us to permit replacement satellites that are "functionally equivalent" to those authorized or have "the same particulars of operation," to enable them to more readily include evolutions in design into newer satellites. These are the same proposals and arguments we rejected when we adopted the blanket authorization standards for NVNG MSS satellites.[251] In the absence of arguments or evidence demonstrating that the NVNG MSS service is not analogous to the Big LEO service, we continue to believe our interests in assuring the continued compatibility of the subject systems with other users of the spectrum outweigh any convenience for licensees in a laxer standard. A modification application to upgrade satellite design will not be unduly burdensome and should not impede technical innovation.

184. We also deny the request of LQP and Constellation that a licensee be permitted to put "spare" satellites into service under their blanket license in order to enhance their systems. These parties would require only that there be no overall increase in effective isotropically radiated power (e.i.r.p.), pfd, or any other sharing criterion, and argue that this policy would allow licensees to increase path diversity, which can be a significant service improvement for CDMA systems. We are not convinced by LQP and Constellation that other operators would not

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[250] Technically identical satellites must have identical satellite antenna footprints and transmission parameters. They need not, however, have the identical physical structure or microelectronics.

[251] See NVNG MSS Order, note 48, supra, at 8452.

be affected by the operation of facilities that have not been specifically analyzed and appropriately authorized. Accordingly, we affirm our requirement that any satellites that an applicant wishes to include in its system must be specified in its initial application or a modification application.

185. We proposed in the Notice that license terms will begin automatically with the first transmission from the first authorized satellite, and will continue for ten years.[252] All parties agree with the length of the license term. One party proposes that a license term should commence only after commencement of actual service or within six months of launch, whichever occurs first. Apparently, the concern is that the license term will begin to run before a licensee has launched a sufficient number of satellites with which to begin commercial operations. This overlooks our general policy that, because all transmissions are capable of causing interference, satellite license terms in all satellite services begin when radio transmissions commence. We will not treat Big LEO operators differently by permitting them to engage in any transmissions, whether those transmissions are to test the system's functioning or to provide a fully implemented commercial service, without a valid operating license. Further, we do not believe that Big LEO operators will be unduly burdened if the license term for the system begins to run on the date of the first transmission. If fuel is left on the satellite after its license term has expired, we will entertain a request for special temporary authority to continue to operate if that location has not been assigned to a new system.[253] Thus, we adopt our rule as proposed.

186. We also proposed a filing window for system replacement applications identical to the one implemented in the analogous NVNG MSS service. Specifically, we proposed that applications for the next generation Big LEO systems must be filed no earlier than three months prior to and no later than one month after the end of the seventh year of the existing license.[254] Motorola, LQP and Constellation variously contend that some replacement applications could affect other licensees' rights and thus potentially affected licensees should be able to file replacement applications earlier. No party has explained, however, why our proposed rules fail to provide adequate opportunity for affected entities to respond to proposed replacement systems, thus protecting their rights. We will therefore adopt the filing window for replacement systems as proposed.

187. In the Notice, we stated that we intend to grant replacement applications if frequencies remain available for use by such systems, consistent with our practice for other

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[252] This follows the one-step processing and licensing policy that has been used for satellites since 1980. See 1980 Assignment Order, 84 FCC 2d 584 (1981).

[253] In the past, we have granted such requests when continued operations will not prevent a state-of-the-art satellite from taking its place. See, e.g., Hughes Communications Galaxy, Inc., 9 FCC Rcd 217 (1994); Hughes Communications Galaxy, Inc., 9 FCC Rcd 218 (1994); and American Telephone and Telegraph Co., 8 FCC Rcd 8741 (1993).

[254] Proposed Section 25.120(e).

satellite services.[255] Three applicants urge us to adopt an explicit replacement expectancy, with TRW proposing a specific provision that would provide such an expectancy upon a licensee's consistent regulatory compliance. The Commission, however, has historically rejected establishing an explicit replacement expectancy for space station systems.[256] We have repeatedly noted circumstances such as intervening international agreements or changes in technology may affect our determination as to whether a replacement system would serve the public interest. We assure Big LEO licensees that given the enormous investment necessary to construct and operate a satellite system, we will consider replacement applications in this service similar to other satellite services, that is, we will grant authority to implement a next generation system unless extraordinary circumstances prevent us from doing so.

3. Implementation Milestones

188. As proposed in the Notice, we will adopt a set of satellite construction milestones modeled on those used in the NVNG MSS service. All parties agree that implementation milestones to monitor the progress of system implementation are advisable, and most parties approve of the essential elements of our proposed milestones, with certain minor clarifications and modifications, some of which we are adopting.

189. Each licensee will be required to adhere to a strict timetable for the system implementation. Failure to meet this timetable will render the authorization null and void. We will generally require each licensee to begin construction of its first two satellites within one year of the unconditional grant of its authorization, and complete construction of those first two satellites within four years of that grant. Construction for the remaining authorized operating satellites in the constellation must begin within three years of the initial authorization, and the entire authorized system must be operational within six years.[257] While we do not intend to deviate from these requirements for commencing construction, we may authorize a different schedule if an applicant concretely demonstrates that its proposed system's size and/or complexity warrants additional time because of the size or complexity of its proposed system.[258] In every case, the licensee's individual milestone timetable will be set and become a condition of its authorization. Some parties propose that we consider granting extensions of time to a licensee that has launched at least part of its system. We will not adopt such a provision, which would suggest that we will not enforce strictly the system completion requirement. Incomplete systems will not justify the reservation of the orbit/spectrum resource from other potential users, and

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[255] Notice, note 2, supra, at n.134.

[256] See, e.g., Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972 (1988 Assignment Order), at n. 31.

[257] Some applicants' suggestions for additional milestones are based on their mistaken belief that the Notice did not include a final system completion requirement.

[258] See Notice, note 2, supra at 1136.

applicants should not anticipate that their authorization will require anything less than a complete commitment of those resources necessary to execute the full global system upon which their authorization is premised.

190. We also will not impose a separate deadline for construction of in-orbit spares. We will leave the determination of what is an appropriate timetable for building or launching in-orbit spares to each licensee. It is reasonable to believe that if the rest of the system is implemented in a timely fashion, any in-orbit spares will also be put into place on a timetable deemed prudent by the operator. Moreover, we do not wish to discourage applicants from proposing as many in-orbit spares for inclusion in their initial blanket authorizations as they deem appropriate.

191. Some of the parties ask us to forego the construction commencement milestone in favor of a timetable that would focus only on the initiation of commercial service. They primarily contend that our milestones are unfair to those systems that could begin to provide service in stages (and, presumably, finance construction of the last satellites from initial revenue streams). We are concerned, however, that such a timetable would prevent prompt identification and elimination of those applicants that are not, for whatever reason, committed to building a system expeditiously that is capable of providing global service.[259] Most applicants fully support a global coverage requirement.[260]

192. Several applicants suggest that we adopt a more detailed standard or a series of milestones to enable us to track implementation progress more closely. LQP argues that this could result in long undetected delays in progress. We do not believe interim milestones are necessary. The annual reporting requirements (further discussed below) and our ability to demand additional contract and construction information should enable us to respond promptly to any implementation failures.

193. Motorola suggests that we require a specific and significant portion of the ground segment to be constructed on the same timetable as the space segment.[261] Such a requirement, opposed by all other applicants, is undesirable. As noted, service provision in foreign countries will be subject to a particular country's authorization. We cannot require a licensee to meet an implementation milestone when its ability to do so is outside of its control. In any event,

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[259] Any applicant whose financial capability would be so constrained by the proposed construction milestones likely will not meet our financial qualifications. The milestones and the financial requirements provide a balanced approach to determining the actual capability of the applicants to implement the system and service they propose.

[260] See paras. 21-23, supra.

[261] Motorola would require a ground segment covering 75% of the world's population and 75% of the world's land area within six years of initial system authorization.

licensees that have launched enough satellites to provide service should have no difficulty constructing their corresponding earth segments.

4. Reporting Requirements

194. We will also generally follow the NVNG MSS rules for annual reporting requirements for this service, as proposed in the Notice and supported by most parties. Every licensee must provide an annual report fully describing the status of its construction, system loading and any outages or malfunctions that have occurred during the reporting period. These reports will be required on June 30 of each year.

195. Although several applicants argue that the information requested is either too burdensome or too proprietary in nature for dissemination, we believe this information is needed to allow us to evaluate whether, and to what extent, the spectrum is being used and to monitor construction progress. Licensees may request confidentiality for any portion of their report, pursuant to Section 0.459 of the Commission's rules, 47 C.F.R. § 0.459. As proposed in the Notice, we will also require that each licensee to certify to us within ten days of the date of any milestone requirement that the milestone was met or to advise us that it was not.

5. Distress and Safety Communications

196. Although Big LEO applicants did not indicate that they plan to use their systems for extensive distress and safety communications, we recognized in the Notice that because these systems have position determination capability,[262] they have the potential to complement existing search and rescue (SAR) and disaster response services. Further, although we recognize that Big LEO services cannot be used in lieu of distress beacons, such as satellite emergency position locator transmitters or emergency indicator radio beacons, that are required to be carried by international agreement or statute,[263] Big LEO system operators have certain obligations relating to maritime distress communications under Sections 321(b) and 359 of the Communications Act, 47 U.S.C. §§ 321(b), 359.[264] Other than these mandated requirements, we did not propose to

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[262] See para. 104, supra.

[263] Compulsory equipment carriage requirements are established in portions of the Commission's rules as well as by statute. See, e.g., 47 C.F.R. §§ 80.801, et seq.; Ch. IV, International Convention on the Safety of Life at Sea, 32 U.S.T. 47, T.I.A.S. 9700 (1974).

[264] Specifically, Section 321 of the Communications Act, 47 U.S.C. § 321, requires, inter alia, that all radio stations including Government stations and foreign ship stations within U.S. territorial waters, give absolute priority to radio communications or signals relating to ships in distress. Section 359 of the Communications Act, 47 U.S.C. § 359, requires, inter alia, that U. S. ships that encounter dangers to navigation such as, dangerous ice or winds whose force is 10 or above on the Beaufort scale must transmit such information to ships in the vicinity and authorities on land. Section 359 also prohibits ships or mobile stations from charging for

require Big LEO systems to provide search and rescue or disaster response communications as a general service offering. We stated, however, that we expected that any satellite licensee that chose to offer emergency or safety communications services will coordinate its effort with the appropriate search and rescue organizations.[265] These requirements were contained in proposed rule section 25.143(f).

197. Mr. Bernard Trudell (Trudell) states that in cases of emergency all MSS providers should be required to comply with standards and call routing that will ensure the safety and well being of the public.[266] Additionally, Trudell states that most MSS providers indicated that they would provide distress and safety services in part as justification for license authority.[267] Trudell concludes that the Commission should require MSS providers to address these issues. The U.S. Coast Guard (Coast Guard) states that it will depend increasingly on 9-1-1-type services and caller ID for its SAR operations and to prevent hoaxes. It requests, therefore, that Big LEO systems be required to provide standard location and caller ID information.[268] Several commenters expressed similar opinions stating, generally, that the Commission should require that Big LEO systems be required to provide standardized information that would identify the calling party, give the calling party's location and route emergency messages to an appropriate emergency organization.[269] The Interagency Committee for Search and Rescue[270] (ICSAR) noted all proposed Big LEO providers had stated that their systems will be available for distress and

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transmitting messages related to dangers to navigation.

[265] For example, the Interagency Committee on Search and Rescue (ICSAR) is composed of representatives from seven Federal Agencies, including the FCC, and has search and rescue responsibilities in the United States. Any satellite operator offering emergency services within the United States should coordinate the establishment of emergency services and procedures for its use with this organization. Similar procedures should be developed with all other domestic and international search and rescue organizations so that coordinated rescue operations can be quickly effected in the geographic area of concern.

[266] Trudell Comments at 4.

[267] Id at 2.

[268] Coast Guard Comments at 1.

[269] See, e.g., Comments of the National Association of EMS Physicians at 1; Comments of the Texas Advisory Commission on State Emergency Communications at 2, Reply Comments at 2; Reply Comments of the National Institute for Urban Search and Rescue at 2 and 3; and Reply Comments of the National Emergency Number Association at 3.

[270] ICSAR is made up of representatives from seven Federal agencies including the Federal Communications Commission. This Committee has search and rescue responsibilities under the United States National Search and Rescue Plan.

safety communications and recommends that the Commission develop requirements to ensure that MSS systems meet public safety needs.[271] ICSAR also recommends that these issues -- standardized location, caller ID and routing of emergency or distress calls -- be addressed in a separate rule making.[272] The National Emergency Number Association states that the Commission should adopt a rule to require that licensees of Big LEO systems cooperate in the provision of National Security and Emergency Preparedness (NS/EP) communications.[273]

198. LQP states that it supports the Commission's proposed rule regarding distress and safety communications and in principle its obligation regarding distress communications, but opposes having to provide search and rescue or disaster response communications as a general service offering.[274] LQP stated that the Commission should follow its decision reached in the Little LEO proceeding.[275] Motorola states that it does not object to the proposed rule and notes that consistent with the Commission's decision in the Little LEO proceeding, the Commission did not intend to require that Big LEO MSS licensees show specific means of interconnection to route distress calls and did not intend for Big LEO MSS stations to be used in lieu of emergency beacons required to be carried by international agreement or statute.[276] Motorola strongly opposes the imposition of a specific technical model for the 9-1-1 interconnection and location information delivery.[277]

199. Many of the Big LEO applicants acknowledge that they may carry distress and safety or disaster response communications. They argue that this would be, however, no different than the capability of cellular radios today or future personal communications services that may be used in the event of a distress or an emergency. In the Notice, we reminded licensees of their obligations under the Communications Act regarding distress communications and noted the potential for such systems to complement existing services, but, also recognized that Big LEO systems are not intended to replace existing international safety services. Further, the Commission has begun to examine matters related to enhanced 9-1-1 capability including position

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[271] ICSAR Reply Comments at 2.

[272] Id. See also Summary of Pertinent Comments attached to ICSAR's Reply Comments for a summary of issues.

[273] National Communications System Comments at 2.

[274] LQP Comments at 116, Reply Comments at 94. See also Comments of TRW at 193 and Constellation Reply Comments at 54.

[275] See NVNG MSS Order, note 48, supra, at 8458.

[276] Motorola Comments at 68.

[277] See Motorola Reply Comments at 54-55.

location in PCS, cellular and other mobile services in a recently initiated rule making.[278] We are, therefore, denying commenters requests that the Commission require caller ID, standardized position information and automatic routing for distress and safety communications or disaster response communications. We will address those issues in our rulemaking proceeding on enhanced 9-1-1 capability,[279] and we will adopt section 25.143(f) substantially as proposed.

200. We also noted, however, that we expected any satellite licensee that chose to offer emergency or safety communications to coordinate with appropriate SAR organizations.[280] No commenters opposed this suggestion and we are adding it to the proposed rule.

201. Comsat states that because of the critical nature of distress and safety communications to the maritime community and the extensive international effort that is underway to implement the Global Maritime Distress and Safety System (GMDSS),[281] the Commission should determine the extent to which applicants for Big LEO systems will provide distress and safety communications and participate in the GMDSS.[282] Mobile Datacom requests clarification of the proposed requirement for position determination capability for Big LEO systems related to distress communications.[283] Specifically, it requests that the Commission clarify whether Big LEO systems will be permitted to arrange for radio determination satellite service (RDSS) from companies such as Mobile Datacom.[284]

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[278] See Second Report and Order, Gen. Docket No. 90-314, 8 FCC Rcd 7700 (1993), at para. 139. Notice of Proposed Rulemaking in CC Docket No. 94-102, FCC 94-237 (adopted September 19, 1994) (Enhanced 9-1-1 Notice).

[279] Id.

[280] See Notice, note 2, supra, at para. 86.

[281] Certain U.S. ships are required to carry radio equipment. Carriage requirements are established by statute, treaty and in the Commission's Rules. See, Sections 351 through 386 of the Communications Act of 1934, 47 U.S.C. §§ 351-386; Amendments to the 1974 SOLAS Convention concerning Radiocommunications for the Global Maritime Distress and Safety System, Ch. IV, International Convention for the Safety of Life at Sea, 32 U.S.T. 47, T.I.A.S. 9700 (1974); and subparts Q, R, S, T and W of the Commission's Rules, 47 C.F.R. subparts Q, R, S, T and W.

[282] COMSAT Comments at 14.

[283] Mobile Datacom apparently believes that the Commission proposed a requirement for position information because of the requirements in the Communications Act related to distress and safety communications. The proposed requirement for position information is, however, related to interference protection for the radio astronomy service.

[284] Mobile Datacom Comments at 14.

202. As we noted in paragraph 86 of the Notice, Big LEO systems may not be used in lieu of emergency beacons required to be carried by statute or treaty. In response to Comsat's request, we note that Big LEO systems cannot now be used to comply with the requirements of the GMDSS. The requirements for GMDSS equipment and the approval process are contained in Sections 80.1101 and 80.1103, respectively, of the Commission's Rules.[285] There are, however, no restrictions prohibiting any Big LEO system from carrying distress and safety communications on an ancillary basis. Finally, in response to Mobile Datacom's request for clarification of whether position determination information can be supplied by an RDSS licensee, we proposed that Big LEO systems be capable of determining the position of a user transceiver, but did not specify how licensees have to derive the position information. We believe that decision is best left to the system provider. In conclusion, we are clarifying the language in Section 25.143(f) regarding a licensee's responsibility to protect distress communications and to make clear that although it is the licensee's responsibility to determine position information of transceivers that we are not prescribing how this must be accomplished.[286]

6. Other Requirements

203. As proposed in the Notice and without objection from any interested parties, we will adopt a specific rule that prohibits any licensee from selling a bare license for a profit.[287] This provision is critical to discourage speculators and to prevent unjust enrichment of those who do not implement their proposed systems. This provision is not intended to prevent the infusion of capital by either debt or equity financing, but any such transaction will be monitored to ensure that it does not constitute an evasion of our anti-trafficking provision.[288] This rule, however, will not apply if auctions are implemented. It is not intended to prohibit applicants who obtain licenses by competitive bidding from negotiating post-auction resale transactions.[289]

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[285] See 47 C.F.R. §§ 80.1101 and 80.1103.

[286] TRW states that Big LEO system licensees operating on U.S. territorial waters are required to give priority to distress communications. See TRW Comments at 194. Motorola stated that the requirements of proposed rule section 25.143(f) would apply only for MSS stations used to comply with an international agreement or statute. See Motorola Comments at 68 and Reply Comments at 58.

[287] See Notice, note 2, supra, at para. 84.

[288] Motorola is concerned that one applicant might prop up another simply to guarantee access to the maximum possible spectrum by CDMA operations. This concern can be appropriately addressed as a real party in interest question if the issue arises. Motorola's speculation about a possible future occurrence does not warrant further consideration or action at this time.

[289] See para. 96, supra.

204. In the Notice, we also requested comment on whether any additional public service requirements should be imposed on Big LEO licensees. Those favoring such a requirement were instructed to provide an analysis of the utility of Big LEO systems to provide these services and an analysis of the existing systems used to provide these services, including their costs. Several commenters recognize the important potential of MSS for educational and public service uses.[290] The Corporation for Public Broadcasting (CPB), for example, discusses the promise of Big LEO systems to provide educational services to those in remote areas and to allow users throughout the world to take "electronic field trips." CPB urges that to ensure public access to these services, the Commission should require licensees to make their systems available to educators and students at preferential rates. It further argues that even if the Commission does not mandate a rate preference in this proceeding, it should consider imposing such a requirement in a variety of other services.

205. None of the LEO applicants supports a mandatory service or preferential rate requirement. Ellipsat notes that MSS systems are unsuitable for providing the envisioned services. According to Ellipsat, Big LEO systems have inherently low data rates and cannot supply the high bandwidth required to support the contemplated educational services without drastically absorbing MSS capacity.[291] Motorola further argues that requiring Big LEO operators to dedicate a portion of their capacity to non-revenue generating activities would unduly constrain MSS systems and would handicap them in their ability to compete with other wireless services and with foreign MSS providers.[292] TRW and Motorola argue that none of the proponents of such a requirement have provided a detailed analysis of existing systems and costs, as required. In the absence of this analysis, they conclude that there is no basis upon which the Commission could impose public service requirements.[293]

206. In light of the service hardships alleged by the system proponents, we believe that a strong demonstration of need and feasibility is required prior to adopting specific public service requirements for Big LEO systems. We agree with Motorola and TRW that there is not sufficient information in this record to support such requirements at this time.

207. The National Communication Systems (NCS) believes that Big LEO licensees should be required to cooperate in providing national security/emergency preparedness services (NS/EP) and that any discussion of technical requirements for Big LEO systems should address survivable and endurable communications. NCS does not propose specific rules but instead

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[290] See Joint Comments of the Association of America's Public Television Stations and Public Broadcasting Service at 2; Comments of National Public Radio at 2; Comments of the Corporation for Public Broadcasting at 2-3.

[291] Ellipsat Reply Comments at 36.

[292] Motorola Reply Comments at 58.

[293] TRW Reply Comments at 95; Motorola Reply Comments at 59.

requests that the Commission consider these issues in its report and order. We note that the Commission has chartered a federal advisory committee, the Network Reliability Council (NRC), to consider whether and to what extent essential services, including emergency 9-1-1 service, health, safety and other emergency communications services, are compromised during network outages.[294] The NRC agreed that national security would be included within the topic of emergency services pursuant to its charter.[295] We further note that on September 19, 1994 the Commission adopted a Notice of Inquiry requesting comment on the extent to which mobile radio services, including LEO MSS, should be required to meet compatibility requirements with 9-1-1 services.[296] The Commission will consider issues regarding the availability of reliable emergency services in these proceedings.

F. Mobile Earth Station Licensing

208. In the Notice, the Commission proposed a licensing procedure for the earth station segment of the satellite system. We indicated that the ground segment will be comprised of central fixed-earth "gateway" stations operating in the feeder link frequency bands, mobile user transceiver units operating in the mobile satellite frequency bands, and tracking, telemetry and command (TT&C) earth stations operating in either the feeder link, mobile service or space bands. We proposed to license gateway and TT&C stations as fixed-satellite earth stations under Part 25. In addition, we proposed a blanket licensing approach for the user transceivers. Under this approach, a service vendor, which may or may not be the space station licensee, would hold the authorization and would be responsible for a specified number of technically identical transceiver units. Blanket applications would include a demonstration that the operation of transceivers will not interfere with other authorized users. License term would be ten years from date of grant and requests for additional units would be treated as minor license modifications.[297] In addition, we proposed that an end user be required to obtain authorization of the space station operator before the user may transmit to that system and, that once access authority is obtained, the operations of that transceiver would fall under the blanket earth station license of the space station operator or the vendor. Our proposed rules would not preclude bilateral, government-to-government discussions regarding international roaming arrangements. They would also permit roaming into the United States by users having technically compatible transceivers designed to operate with U.S. licensed systems and once authorized to access a U.S. system, a roaming user's transceiver operations would fall within the blanket license of the satellite operator or the service

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[294] See 59 FR 31246 (June 17, 1994).

[295] See Minutes of the Network Reliability Council Meeting, July 6, 1994.

[296] See Enhanced 9-1-1 Notice, note 278, supra.

[297] See proposed Sections 25.115(d), 25.130(b), 25.133(b), 25.136, and 25.213.

vendor. The regulatory treatment of earth station licensees providing commercial mobile radio services would be as common carriers.[298]

209. The comments received in response to our proposals were favorable[299] and thus we will adopt the rules substantially as proposed. Constellation and Motorola, suggested several minor clarifications to the final rules and we will adopt these suggestions.[300] We will not, however, adopt at this time a complete revision of § 25.115, Applications for Earth Station Authorizations, as suggested by Motorola. If experience with these licensing procedures indicates that this rule, as it applies to the Big LEO service, needs to be amended, we will consider doing so at a later time.[301]

G. International Issues

1. Coordination

210. As we stated in the Notice, non-geostationary mobile satellites, in their orbits around the world, will pass over all countries. Because these systems provide global coverage, each will require global coordination. As with all satellite services, each Big LEO applicant and licensee will be required to provide the Commission with all information necessary for advance publication, coordination, and notification of frequency assignments pursuant to the international Radio Regulations and for consultation pursuant to Article 14 of the INTELSAT Agreement and Article 8 of the INMARSAT Convention.[302]

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[298] See Notice, note 2, supra, at paras. 88-90.

[299] See, e.g., Comments of TRW, Inc. and Comsat Corporation.

[300] These include adding to § 25.115(d)(3) the words "if not already licensed under this subpart" to clarify that gateway, TT&C and Network Control earth stations can be licensed under other procedures; adding to § 25.120(e) language relating to renewals and cut-off periods; clarifying § 25.136(b) to distinguish between authorization of a particular unit and use of the system; clarifying § 25.130(b) to recognize specific procedures for NVNG MSS transceiver units; and clarifying § 25.136(a) to include cockpit communications.

[301] Other than Section 25.213(b), we will not adopt specific technical requirements for Big LEO transceivers at this time. These requirements are being considered in domestic and international fora and will be codified, if necessary, when earth station applications have been filed. We note that user transceivers will be required to comply with all applicable domestic and international standards governing their operations, including the radiofrequency radiation levels recommended by the American National Standards Institute (ANSI). See 47 C.F.R. § 1.1.1307(b).

[302] See 47 C.F.R. § 25.111(b).

211. Furthermore, the ITU (WARC-92) has adopted Resolution 46 to govern the coordination of mobile satellite systems in this frequency band. This procedure assures that worldwide coordination is accomplished in a manner that requires both the administration proposing the system and the administration that is affected by the planned system to cooperate in resolving coordination difficulties.[303] We agree with LQP and TRW that successful coordination under Resolution 46 is not a prerequisite for licensing, launching and operating these systems.[304] We note, however, that until they successfully complete coordination they cannot cause harmful interference to other primary services operating in these frequency bands, nor can they claim protection. We, however, will follow the coordination procedures prescribed by the ITU and will work with the global community to promote mobile satellite services through the development of sharing techniques and the exploration of other technical issues.[305] Moreover, as we stated in our Notice, we will continue to require our licensees to meet both their international obligations and any national requirements imposed by other licensing administrations regarding operations within their territories.[306] We continue to believe that decisions relating to the implementation of Big LEO service within a country's territory will remain within that country's jurisdiction and control.

212. In the Joint Proposal, the parties state that the Commission should establish a global band segmentation sharing plan different than the spectrum domestic spectrum plan. Specifically, the parties state that outside of North America, CDMA MSS licensees should be limited to operating their systems over 9.75 MHz of spectrum at 1610-1619.75 MHz and that the TDMA MSS licensee should be limited to operating its system over 6.75 MHz of spectrum at 1619.75 - 1626.5 MHz. According to the Joint Proposal, all U.S. international coordination activity should be based either on the domestic band segmentation plan we are adopting today, or, outside North America, on the proposed global plan. In addition, the parties to the Joint Proposal request the Commission to prohibit MSS licensees from seeking or accepting an exclusive assignment in the 1.6 GHz band that would preclude other MSS systems from providing service in any foreign country. LQP objects to these proposals, stating that they could be construed as preempting other nations' sovereign decisions.

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[303] ITU Resolution No. 46 (WARC-92, Res.46) states that "[a]ffected administrations, as well as the administration seeking coordination, shall make all possible mutual efforts to overcome the difficulties in a manner acceptable to the parties concerned."

[304] See LQP Comments at 117 and TRW Comments at 196. However, as we stated in our Notice, if a licensee has not completed coordination prior to launch, it must operate on a non-interference basis with respect to authorized users. See international Radio Regulation (RR) 342.

[305] Indeed, the United States participates actively in ITU-R Study Groups 2, 4 and 8, all of which are examining issues that address sharing and coordination of MSS systems.

[306] To the extent a licensee does not desire to meet a national requirement of a licensing administration within its territory, it may refrain from providing service to that particular administration. See TRW Comments at 196.

213. We will not impose a global band sharing plan on U.S. licensees at this time. The four parties to the Joint Proposal have not given any justification for doing so, and one applicant specifically opposes the imposition of such a plan. We have no evidence on the record before us of imminent coordination conflicts among the applicants beyond U.S. borders. Neither is it clear at present that operating constraints designed to accommodate our domestic licensees will provide either necessary or effective in other jurisdictions. Perhaps most importantly, we do not believe it is appropriate for the United States to impose global band sharing restrictions, that directly impact the ability of other countries to access these systems as they see fit, absent indications from these countries regarding their planned use of these frequency bands. Accordingly, we will not mandate a band sharing scheme to be followed beyond U.S. borders.

2. EC Concerns

214. The Delegation of the European Commission (EC) is concerned that the proposals in the Notice are based purely upon domestic U.S. interests despite the global nature of the proposed systems and services. Specifically, the EC alleges that the Notice: (1) fails to take into account proposed non-U.S. or future systems, their access to the U.S. market and use of spectrum in the U.S.; (2) indicates an intention to extend Section 310 restrictions to the proposed systems inhibiting potential European investment; (3) advances trade and industrial policy arguments underlining the importance of the proposed systems to the U.S. economy and U.S. leadership; (4) proposes unilateral solutions to orbit, frequency and coverage issues that are global in nature; (5) fails to discuss requirements to effect the satisfactory application of Resolutions 46 and 70 of WARC-92; and (6) fails to address issues related to access to the 2 GHz band. The EC states that the regulatory approach that we proposed raises global regulatory and trade issues and that the U.S. should not proceed with its domestic licensing process until it consults with foreign administrations.

215. We agree that the proposed systems have international ramifications. Many of these are or will be addressed in appropriate international fora and in ITU satellite coordination activities. Others may be appropriate for bilateral consultations of the nature sought by the EC. However, we do not agree that the U.S. domestic licensing process must await final resolution of these issues.

216. We find delaying the U.S. licensing process is unacceptable. Delaying our regulatory process would delay the improved communications and economic growth that Big LEO services will create. These benefits would be developed both for citizens of the United States and all other countries that may choose to participate in rendering these services. Such a delay would also harm developing countries by limiting their opportunity to improve their communications infrastructure. The uncertainty associated with delay could also adversely impact the viability of the proposed systems in the financial markets and the ability of the applicants to attract additional investors. U.S. applicants have already invested significant resources in research and development, satellite design, marketing and participation in ITU meetings and conferences. Even if the United States were to delay its licensing process, it is unclear how the EC proposes to resolve the issues it has identified, resulting in open-ended delay. Further, the

EC's criticism of our proposals is not accompanied by recommendations. Indeed, it is not clear that the EC is yet in a position to speak authoritatively for its member countries. We do not believe that an indefinite delay in the U.S. regulatory process under such circumstances is warranted.

217. It is also clear that there we do not need to delay the domestic licensing proceeding until international agreements are finalized. Regardless of our domestic decisions, each administration will retain the right to license gateway earth stations and mobile earth stations needed to provide service. In addition, U.S. licensees will be subject to ITU recommendations and coordination procedures. Further, the United States is working within the ITU Radiocommunications sector to develop standards applicable to LEO systems. However, we seek to leave system design and service offerings to the licensees as much as possible in order to encourage technological innovation, to promote rapid implementation of Big LEO services and to maximize consumer choice. Therefore it is in the interest of the United States' government and U.S. system operators to seek globally acceptable standards and we will strive to do so. We disagree with the EC that we are not taking into account projects envisaged outside the United States and future global systems that might use the spectrum. In the Notice, we noted that all U.S. satellite systems are subject to ITU coordination procedures.[307] Thus, U.S.-licensed operators are required to coordinate their proposed systems with countries whose existing services, or whose possible future MSS systems, might be affected. Regardless of the spectrum licensing arrangement within the United States, we would work with affected administrations to resolve any spectrum sharing or technical issues. Further, we are not precluding access to the the U.S. market. We believe, however, that subject is more appropriately handled through bilateral discussions (as the EC contemplates) and the ITU coordination process.

218. In addition, we are not seeking to extend Section 310 restrictions on the proposed systems with the intention of inhibiting European investment. In fact, Section 310(b) restrictions will not necessarily apply to the systems because we are not requiring them to operate on a common carrier basis.[308] This policy will permit investment by European industry and other non-government interests. Some of the proposed systems already anticipate significant non-U.S. investment and continue to seek additional such participation. We recognize multinational participation as an integral part of developing a global system.

219. With regard to the EC's concern that we are advancing trade and industrial policy arguments by moving ahead with the proposed systems, we note that a report prepared by PKMG Peat Marwick on behalf of the European Commission suggests that (with regard to Europe), "...the immediate priority is international trade and policy issues;"[309] the very issues the EC

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[307] Notice, note 2, supra, at para. 91.

[308] See paras. 171-181, supra.

[309] See "Satellite Personal Communications and their Consequences for European Telecommunications Trade and Industry," KPMG Peat Marwick, at 4, emphasis added.

accuses the United States of advancing. Notwithstanding the EC's views, the United States has every right under established ITU procedures to move forward with licensing systems that are necessary to satisfy domestic demand for new communication services. Other administrations have the right to decide whether these or any other non-U.S. licensed systems will operate in their countries and whether to participate in the provision of services. Participation in providing these MSS services will give their industries the opportunity to share in the global economic benefits we believe these systems will bring.

220. The EC also argues that the Notice proposes unilateral solutions to orbit, frequency and coverage issues that have global implications. Further, it contends that the Notice fails to discuss requirements necessary to effect the application of ITU Resolution Nos. 46 and 70.

221. With regard to orbit considerations[310] and the use of 1.6/2.4 GHz frequencies, we note that as a matter of course the United States engages in good faith negotiations with respect to whatever non-U.S. systems have been filed with the ITU at the time U.S. systems are ready to begin coordination.[311] Consequently, the use of the orbits and of frequencies by U.S.-licensed systems will be subject to the outcome of the ITU coordination process. The worldwide coverage conditions proposed in the Notice[312] result from our desire that these systems be capable of providing coverage to all areas of the world. This could further U.S. participation in the global information infrastructure and potentially benefit developing countries. Again, however, whether U.S.-licensed systems provide services outside the United States would be subject to the agreement of and authorization by other administrations.

222. With regard to the application of Resolutions No. 46 and 70, we note that Resolution No. 46 relates to "interim" procedures for the coordination and notification of non-geostationary satellite networks. As an interim procedure it is subject to further development and will likely evolve. Nevertheless, U.S.-licensed systems will be subject to whatever coordination procedures are in effect at the time, including Resolution 46 or its successor. In the Notice we stated explicitly that we would follow coordination procedures prescribed by the ITU, and in fact we reference Resolution No. 46 and its applicability to Big LEO systems.[313] We also note that each Big LEO applicant will be required to provide us all information necessary to

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[310] We assume here that the EC refers to non-geostationary vs. geostationary orbits.

[311] We note that the following administrations have proposed MSS systems in the 1.6/2.4 GHz bands that have been advance published, coordinated or notified with the ITU: France (2 systems); Germany; INMARSAT; Russian Federation (2 systems); Tonga (4 systems); and the United States (2 systems).

[312] Notice, note 2, supra, at para. 23.

[313] Notice, note 2, supra, at para. 92 and n. 149.

advance publish, notify and coordinate their proposed systems. Implicitly, all applicants will be required to assist us in effecting whatever coordination procedures the ITU requires.[314]

223. On the other hand, Resolution 70 relates to "establishment" of standards for low-orbit satellite systems and has no requirements per se. It seeks to begin the process of establishing standards for low-orbit satellite systems and invites the appropriate ITU organs to begin studies in this regard. The United States participates in these ITU activities and will continue to do so. However, as Resolution No. 70 has not resulted in any specific ITU recommendations, it is not possible to address "requirements" in a domestic licensing proceeding.

224. Finally, the EC contends that the Notice fails to address issues related to access to 2 GHz MSS bands[315] and the relation between access to those bands and the bands under consideration here. First, we note that the 2 GHz bands have not yet been allocated for MSS in the United States. Therefore, these bands will be the subject of another proceeding. In such a proceeding, all matters relevant to the use of 2 GHz bands would be discussed. Nevertheless, we note the increasing demand for access to MSS spectrum worldwide and the potential value of the 2 GHz bands for the provision of MSS. We are also aware of proposals to use the 2 GHz bands for services similar and competitive to those envisaged by the Big LEO applicants.[316] The United States would like to facilitate access to these bands, as does the EC. We believe that WRC-95 and future multi-lateral consultations would present the appropriate fora to discuss access to and use of 2 GHz MSS bands.

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[314] This requirement applies to all FCC-licensed satellite systems and is codified in the FCC rules. See 47 CFR § 25.111(b).

[315] The "2 GHz" MSS bands were allocated at WARC-92 as follows:

1970-1980 MHz and 2160-2170 MHz:
(Regions 1 and 3) - Fixed, Mobile;
(Region 2) - Fixed, Mobile, Mobile-Satellite*

1980-2010 MHz and 2170-2200 MHz:
(Regions 1, 2 and 3) -- Fixed, Mobile, Mobile-Satellite*

* These MSS allocations are available for use after Jan. 1, 2005, except in the U.S., when they will be available after Jan. 1, 1996.

[316] For example, the FCC has received two petitions (names) to provide MSS services in this range. In addition, spectrum in this range has been identified for a satellite component of FLMPTS.

IV. FINAL REGULATORY FLEXIBILITY ANALYSIS

225. Need for Rules and Objective. We have codified proposed rules that will permit Big LEO systems to be licensed. Our objectives have been to promote efficiency and innovation in the licensing and use of the electromagnetic spectrum, to develop competitive and innovative communications systems, and to promote effective and adaptive regulations.

226. Issues Raised by the Public in Response to the Initial Analysis. No comments were received specifically in response to the Initial Regulatory Flexibility Analysis. We have, however, taken into account all issues raised by the public in response to the proposed rules. In certain instances, we have eliminated or modified our proposed rules in response to those comments.

227. Alternatives that would Lessen Impact. The minimal regulatory burden that we have imposed is necessary in order to carry out our duties under the Communications Act and other Federal statutes. We will continue to examine these requirements in an effort to eliminate unnecessary regulations and to minimize significant economic impact on small businesses.

V. CONCLUSION AND ORDERING CLAUSES

228. By our action today, we are adopting regulations that will allow the licensing of competitive voice and data Big LEO systems. This service has the potential to provide the United States public with a wide range of needed mobile voice services and to help stimulate the domestic economy as these multi-billion dollar systems are implemented in the United States and throughout the world.

229. Accordingly, IT IS ORDERED that Parts 25 and 92 of the Commission's rules are amended as specified in Appendix B, effective 30 days after publication in the Federal Register.

230. IT IS FURTHER ORDERED that the applicants will be required to file conforming amendments and all necessary fees no later than November 16, 1994 for continued consideration in this processing group.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Comments/Petitions:

1. Aeronautical Radio, Inc. & The Air Transport Association of America
2. AirTouch Communications
3. AMSC Subsidiary Corporation
4. Association of America's Public Television Stations, & Public Broadcasting Service
5. Barclays de Zoete Wedd Limited
6. Committee On Radio Frequencies, Natl Research Council for the Natl Academy of Sciences
7. COMSAT Mobile Communications
8. Constellation Communications, Inc.
9. Conus Communications Company Limited Partnership
10. Corporation for Public Broadcasting
11. Defense Information Systems Agency (National Communications System)
12. Eastman Kodak Company
13. Ellipsat Corporation
14. EMSAT: Advanced Technology for Emergency Medical Services
15. Fairchild Space and Defense Corporation
16. Federal Aviation Administration
17. Harris Corporation
18. Loral/QUALCOMM Partnership, L.P. (Comments + Technical Appendix)
19. Mobile Datacom Corporation
20. Motorola, Inc.
21. Mr. Bernard J. Trudell
22. National Association of EMS Physicians
23. National Astronomy and Ionosphere Center, Arecibo Observatory
24. National Telephone Cooperative Association
25. National Public Radio, Inc.
26. NOVACOM, Inc.
27. Rockwell International Corporation
28. State of Hawaii, Department of Business, Economic Development & Tourism
29. Texas Advisory Committee on State Emergency Communications
30. TRW Inc.
31. United States Coast Guard, U.S. Department of Transportation
32. Westinghouse Electric Corporation
33. Wireless Cable Association International, Inc., The

Reply Comments:

1. Aeronautical Radio, Inc. and The Air Transport Association of America

2. AirTouch Communications
3. AMSC Subsidiary Corporation
4. Arizona Board of Regents for the Benefit of the University of Arizona, et. al. (ITFS Parties)
5. Committee on Radio Frequencies (Natl Research Council for the Natl Academy of Sciences)
6. Constellation Communications, Inc.
7. Ellipsat Corporation
8. Interagency Committee on Search and Rescue (DOT, United States Coast Guard)
9. Loral/Qualcomm Partnership, L.P.
10. Mobile Datacom Corporation
11. Motorola Satellite Communications, Inc.
12. National Institute for Urban Search and Rescue
13. National Business Aircraft Association, Inc.
14. National Emergency Number Association
15. Newcomb Communications, Inc.
16. Texas Advisory Committee on State Emergency Communications
17. TRW Inc.
18. Wireless Cable Association International, Inc.

APPENDIX B

Title 47 of the Code of Federal Regulations, Parts 2, 25 and 94, are amended as follows:

1. The Table of Contents for Part 25 is revised to read as follows:

PART 25 - SATELLITE COMMUNICATIONS

Subpart A - General

Sec.

25.101 Basis and scope.

25.102 Station authorization required.

25.103 Definitions.

25.104 Preemption of local zoning of earth stations.

25.105 - 25.108 [Reserved]

25.109 Cross-reference.

Subpart B - Applications and Licenses

25.110 Filing of applications, fees, and number of copies.

25.111 Additional information.

25.112 Defective applications.

25.113 Construction permits.

25.114 Applications for space station authorizations.

25.115 Applications for earth station authorizations.

25.116 Amendments to applications.

25.117 Modification of station license.

25.118 Assignment or transfer of control of station authorization.

25.119 Application for special temporary authorization.

25.120 License term and renewals.

EARTH STATIONS

25.130 Filing requirements for transmitting earth stations.

25.131 Filing requirements for receive-only earth stations.

25.132 Verification of earth station antenna performance standards.

25.133 Period of construction; certification of commencement of operation.

25.134 Licensing provisions of very small aperture terminal (VSAT) networks.

25.135 Licensing provisions for earth station networks in the non-voice, non-geostationary mobile-satellite service.

25.136 Operating provisions for earth station networks in the 1.6/2.4 GHz mobile-satellite service.

SPACE STATIONS

25.140 Qualifications of domestic fixed-satellite space station licensees.

25.141 Licensing provisions for the

radiodetermination satellite service.

25.142 Licensing provisions for the non-voice, non-geostationary mobile-satellite service.

25.143 Licensing provisions for the 1.6/2.4 GHz mobile satellite service.

PROCESSING OF APPLICATIONS

25.150 Receipt of Applications.

25.151 Public notice period.

25.152 Dismissal and return of applications.

25.153 Repetitious applications.

25.154 Opposition to applications and other pleadings.

25.155 Mutually exclusive applications.

25.156 Consideration of applications.

FORFEITURE, TERMINATION, AND REINSTATEMENT OF STATION AUTHORIZATION

25.160 Administrative sanctions.

25.161 Automatic termination of station authorization.

25.162 Cause for termination of interference protection.

25.163 Reinstatement.

Subpart C - Technical Standards

25.201 Definitions.

25.202 Frequencies, frequency tolerance and emission limitations.

25.203 Choice of sites and frequencies.

25.204 Power limits.

25.205 Minimum angle of antenna elevation.

25.206 Station identification.

25.207 Cessation of emissions.

25.208 Power flux density limits.

25.209 Antenna performance standards.

25.210 Technical requirements for space stations in the Fixed-Satellite Service.

25.211 Video transmissions in the Domestic Fixed-Satellite Service.

25.212 Narrowband transmissions in the Fixed-Satellite Service.

25.213 Inter-Service coordination

requirements for the 1.6/2.4 GHz Mobile-Satellite Service.

25.251 Special requirements for coordination.

25.252 Maximum permissible interference power.

25.253 Determination of coordination distance for near great circle propagation mechanisms.

25.254 Computation of coordination distance contours for propagation modes associated with precipitation scatter.

25.255 Guidelines for performing interference analyses for near great circle propagation mechanisms.

25.256 Guidelines for performing interference analyses for precipitation scatter modes. [Reserved]

Subpart D -- Technical Operations

25.271 Control of transmitting stations.

25.272 General inter-system coordination procedures.

25.273 Duties regarding space communications transmissions.

25.274 Procedures to be followed in the event of interference.

25.275 Particulars of operation.

25.276 Points of communication.

25.277 Temporary fixed earth station

operations.

25.278 Additional coordination obligation for non-geostationary and geostationary satellite systems in frequencies allocated to the Fixed-Satellite Service.

Subpart E - Developmental Operations

25.279 Inter-Satellite Service.

25.300 Developmental operation.

25.308 Automatic Transmitter Identification System (ATIS)

Subparts F - G -- [Reserved]

Subpart H - Authorization To Own Stock in the Communications Satellite Corporation

25.501 Scope of this subpart.

25.502 Definitions.

25.503 - 25.504 [Reserved]

25.505 Persons requiring authorization.

25.506 - 25.514 [Reserved]

25.515 Method of securing authorization.

25.516 - 25.519 [Reserved]

25.520 Contents of application.

25.521 Who may sign applications.

25.522 Full disclosures.

25.523 Form of application, number of copies, fees, etc.

25.524 [Reserved]

25.525	Action upon applications.
25.526	Amendments.
25.527	Defective applications.
25.528 - 25.529 [Reserved]	
25.530	Scope of authorization.
25.531	Revocation of authorization.

2. The authority citation for Part 25 continues to read as follows:

AUTHORITY: Sections 101 - 404, 76 Stat. 419 - 427; 47 U.S.C. 701 -744, Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interprets or applies sec. 303, 48 Stat. 1082, as amended; 47 U.S.C. 303.

3. Section 25.114 is amended by revising paragraphs (c)(6), (c)(18), and (c)(26), and adding new paragraphs (c)(28) and (d), to read as follows:

§ 25.114 Applications for space station authorizations.

* * * * *

(c) * * *

(6) (i) For geostationary satellite orbit satellites, orbital location, or locations if alternatives are proposed, requested for the satellite, the factors which support such an orbital assignment, the range of orbital locations from which adequate service can be provided and the basis for determining that range of orbital locations, and a detailed explanation of all factors that would limit the orbital arc over which the satellite could adequately serve its expected users.

(ii) For non-geostationary satellite orbit satellites, the number of space stations and applicable information relating to the number of orbital planes, the inclination of the orbital plane(s), the orbital period, the apogee, the perigee, the argument(s) of perigee, active service arc(s), and right ascension of the ascending node(s).

(iii) For 1.6/2.4 GHz Mobile-Satellite Service space stations, the feeder link frequencies requested for the satellite, together with the demonstration required by §§ 25.203(j) and (k).

* * * * *

(18) Detailed information demonstrating the financial qualifications of the applicant to construct and launch the proposed satellites. Applications for domestic fixed-satellite systems and mobile-satellite systems shall provide the financial information required by § 25.140(b)-(e), § 25.142(a)(4), or § 25.143(b)(3), as appropriate. Applications for international satellite systems authorized pursuant to Establishing of Satellite Systems Providing International Communications, 50 FR 42266 (October 18, 1985), 101 FCC 2d 1046 (1985), recon. 61 RR 2d 649 (1986), further recon. 1 FCC Rcd 439 (1986), shall provide the information required by that decision.

* * * * *

(26) Applications for authorizations in the Mobile-Satellite Service in the 1545-1559/1646.5-1660.5 MHz frequency bands shall also provide all information necessary to comply with the policies and procedures set forth in Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service, 52 FR 4017 (Feb. 9, 1987), 2 FCC Rcd 485 (1987).

* * * * *

(28) Applications for authorizations in the 1.6/2.4 GHz Mobile-Satellite Service shall also provide all information specified in § 25.143.

(d) Applicants requesting authority to construct and/or launch a system comprised of technically identical, non-geostationary satellite orbit mobile-satellite service space stations may file a single "blanket" application containing the information specified in paragraph (c) of this section for each representative space station.

4. Section 25.115 is amended by revising paragraph (d) to read as follows:

§ 25.115 Applications for earth station authorizations.

* * * * *

(d) User transceivers in the NVNG and 1.6/2.4 GHz Mobile-Satellite Service need not be individually licensed. Service vendors may file blanket applications for transceiver units using FCC Form 493 and specifying the number of units to be covered by the blanket license. Each application for a blanket license under this section shall include the following:

(1) A general narrative section describing the applicant and the overall system operation,

(2) A Form 430 (Licensee Qualification Report), if not already on file in conjunction with other facilities licensed under this subpart,

(3) A Form 493 for each representative type of user transceiver terminal unit,

(4) A designation of a point of contact where records of individual users will be maintained.

In addition, applicants in the NVNG MSS service shall provide the information described in § 25.135. Applicants in the 1.6/2.4 GHz Mobile-Satellite Service shall demonstrate that the stations comply with the technical requirements specified in § 25.213.

5. Section 25.120 is amended by revising paragraphs (d) and (e) to read as follows:

§ 25.120 License term and renewals.

* * * * *

(d) Space stations.

(1) For geostationary satellite orbit satellites, the license term will begin at 3 a.m. EST on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and that the operations of the satellite fully conform to the terms and conditions of the space station radio authorization.

(2) For non-geostationary satellite orbit satellites, the license term will begin at 3 a.m. EST on the date that the licensee certifies to the Commission that its initial space station has been successfully placed into orbit and that the operations of that satellite fully conform to the terms and conditions of the space station system authorization. All

space stations launched and brought into service during the ten-year license term shall operate pursuant to the system authorization, and the operating authority for all space stations will terminate upon the expiration of the system license.

(e) Renewal of licenses. Applications for renewals of earth station licenses must be submitted on FCC Form 405 (Application for Renewal of Radio Station License in Specified Services) no earlier than 90 days, and no later than 30 days, before the expiration date of the license. Applications for space station system replacement authorization for non-geostationary orbit satellites shall be filed no earlier than 90 days, and no later than 30 days, prior to the end of the seventh year of the existing license term.

6. Section 25.130 is amended by revising paragraph (b) to read as follows:

§ 25.130 Filing requirements for transmitting earth stations.

* * * * *

(b) A frequency coordination analysis in accordance with §25.203 shall be provided for earth stations transmitting in the frequency bands shared with equal rights between terrestrial and space services, except that applications for user transceiver units associated with the NVNG mobile-satellite service shall instead provide the information required by § 25.135 and applications for user transceiver units associated with the 1.6/2.4 GHz Mobile-Satellite Service shall demonstrate that user transceiver operations comply with the requirements set forth in § 25.213.

7. Section 25.133 is amended by revising paragraph (b) to read as follows:

§ 25.133 Period of construction; certification of commencement of operation.

* * * * *

(b) Each license for a transmitting earth station included in this part shall also specify as a condition therein that upon the completion of construction, each licensee must file with the Commission a certification containing the following information: The name of the licensee; file number of the application; call sign of the antenna; date of the license; a certification that the facility as authorized has been completed and that each antenna facility has been tested and is within 2 dB of the pattern specified in § 25.209, § 25.135 (NVNG MSS earth stations), or § 25.213 (1.6/2.4 GHz Mobile-Satellite Service earth stations); the date on which the station became operational; and a statement that the station will remain operational during the license period unless the license is submitted for cancellation. For stations authorized under § 25.115(c) of this part (Large Networks of Small Antennas operating in the 12/14 GHz bands) and § 25.115(d) of this part (User Transceivers in the Mobile-Satellite Service), a certificate must be filed when the network is put into operation.

8. A new section 25.136 is added to read as follows:

§ 25.136 Operating provisions for earth station networks in the 1.6/2.4 GHz mobile-satellite service

In addition to the technical requirements specified in § 25.213, earth stations operating in the 1.6/2.4 GHz Mobile-Satellite Service are subject to the following operating conditions:

(a) User transceiver units associated with the 1.6/2.4 GHz Mobile-Satellite service may not be operated on civil aircraft unless the earth station has a direct physical connection to the aircraft Cabin Communication system.

(b) User transceiver units in this service are authorized to communicate with and through U.S. authorized space stations only. No person shall transmit to a space station unless the specific transmission is first authorized by the space station licensee or by a service vendor authorized by that licensee.

(c) Any user transceiver unit associated with this service will be deemed, when communicating with a particular 1.6/2.4 GHz Mobile-Satellite Service system pursuant to paragraph (b) of this section, to be temporarily associated with and licensed to the system operator or service vendor holding the blanket earth station license awarded pursuant to Section 25.115(d). The domestic earth station licensee shall, for this temporary period, assume the same licensee responsibility for the user transceiver as if the user transceiver were regularly licensed to it.

9. Section 25.141 is amended by revising paragraphs (a) and (f) to read as follows:

§ 25.141 Licensing provisions for the radiodetermination satellite service.

(a) Space station application requirements. Each application for a space station license in the radiodetermination satellite service shall describe in detail the proposed radiodetermination satellite system, setting forth all pertinent technical and operational aspects of the system, including its capability for providing and controlling radiodetermination service on a geographic basis, and the technical, legal and financial qualifications of the applicant. In particular, each application shall include the information specified in Appendix B of Space Station Application Filing Procedures, 93 FCC 2d 1260, 1265 (1983), except that in lieu of demonstrating compliance with item II.F (two degree spacing), applicants are required to demonstrate compatibility with licensed satellite systems in the same frequency band. Applicants must also file information demonstrating compliance with all requirements of this section, specifically including information demonstrating how the applicant has complied or plans to comply with the requirements of paragraph (f) of this section.

* * * * *

(f) Radiodetermination satellite service. Licenses shall coordinate with radiodetermination satellite system licensees to avoid harmful interference to other radiodetermination satellite

systems through (1) power flux density limits; (2) use of pseudorandom-noise codes (for both the satellite-to-user link and for the user-to-satellite link); and (3) random access, time division multiplex techniques. Licensees shall coordinate with 1.6/2.4 GHz Mobile-Satellite Service system licensees to avoid harmful interference to 1.6/2.4 GHz Mobile-Satellite Service systems.

10. A new Section 25.143 is added to read as follows:

§ 25.143 Licensing provisions for the 1.6/2.4 GHz Mobile-Satellite Service.

(a) System License: Applicants authorized to construct and launch a system of technically identical non-geostationary satellite orbit satellites will be awarded a single "blanket" license covering a specified number of space stations to operate in a specified number of orbital planes.

(b) Qualification Requirements.

(1) General Requirements: Each application for a space station system authorization in the 1.6/2.4 GHz mobile-satellite service shall describe in detail the proposed satellite system, setting forth all pertinent technical and operational aspects of the system, and the technical, legal, and financial qualifications of the applicant. In particular, each application shall include the information specified in § 25.114.

(2) Technical Qualifications: In addition to providing the information specified in (b)(1), each applicant shall demonstrate the following:

(i) that the proposed system employs a non-geostationary constellation or constellations of satellites;

(ii) that the proposed system be capable of providing mobile satellite services to all locations as far north as 70° latitude and as far south as 55° latitude for at least 75% of every 24-hour period, i.e., that at least one satellite will be visible above the horizon at an elevation angle of at least 5° for at least 18 hours each day within the described geographic area;

(iii) that the proposed system is capable of providing mobile

satellite services on a continuous basis throughout the fifty states, Puerto Rico and the U.S. Virgin Islands, U.S., i.e., that at least one satellite will be visible above the horizon at an elevation angle of at least 5° at all times within the described geographic areas;

(iv) that operations will not cause unacceptable interference to other authorized users of the spectrum. In particular, each application shall demonstrate that the space station(s) comply with the requirements specified in § 25.213.

(3) Financial Qualifications: Each applicant for a space station system authorization in the 1.6/2.4 GHz mobile-satellite service must demonstrate, on the basis of the documentation contained in its application, that it is financially qualified to meet the estimated costs of the construction and launch of all proposed space stations in the system and the estimated operating expenses for one year after the launch of the initial space station. Financial qualifications must be demonstrated in the form specified in §§ 25.140(c) and (d). In addition, applicants relying on current assets or operating income must submit evidence of a management commitment to the proposed satellite system. Failure to make such a showing will result in the dismissal of the application.

(c) Replacement of Space Stations Within the System License Term. Licensees of 1.6/2.4 GHz mobile-satellite systems authorized through a blanket license pursuant to paragraph (a) of this section need not file separate applications to construct, launch and operate technically identical replacement satellites within the term of the system authorization. However, the licensee shall certify to the Commission, at least thirty days prior to launch of such replacement(s) that:

(1) the licensee intends to launch a space station that is technically identical to those authorized in its system authorization, and

(2) launch of this space station will not cause the licensee to exceed the total number of operating space stations authorized by the Commission.

(d) In-Orbit Spares. Licensees need not file separate applications to operate technically identical in-orbit spares authorized as part of the blanket license pursuant to paragraph (a) of this section. However, the licensee shall certify to the Commission, within 10 days of bringing the in-orbit spare into operation, that operation of this space station did not cause

the licensee to exceed the total number of operating space stations authorized by the Commission.

(e) Reporting requirements.

(1) All operators of 1.6/2.4 GHz mobile-satellite systems shall, on June 30 of each year, file with the International Bureau and the Field Office in Laurel, Maryland a report containing the following information:

(i) Status of satellite construction and anticipated launch dates, including any major problems or delays encountered;

(ii) A listing of any non-scheduled space station outages for more than 30 minutes and the cause or causes of the outage;

(iii) A detailed description of the utilization made of the in-orbit satellite system. That description should identify the percentage of time that the system is actually used for U.S. domestic or transborder transmission, the amount of capacity (if any) sold but not in service within U.S. territorial geographic areas, and the amount of unused system capacity; and

(iv) Identification of any space stations not available for service or otherwise not performing to specifications, the cause or causes of these difficulties, and the date any space station was taken out of service or the malfunction identified.

(2) All operators of 1.6/2.4 GHz mobile-satellite systems shall, within 10 days after a required implementation milestone as specified in the system authorization, certify to the Commission by affidavit that the milestone has been met or notify the Commssion by letter that it has not been met. At

its discretion, the Commission may require the submission of additional information (supported by affidavit of a person or persons with knowledge thereof) to demonstrate that the milestone has been met.

(f) Safety and distress communications.

(1) Stations operating in the 1.6/2.4 GHz Mobile-Satellite Service that are voluntarily installed on a U.S. ship or are used to comply with any statute or regulatory equipment carriage requirements may also be subject to the requirements of sections 321(b) and 359 of the Communications Act of 1934. Licensees are advised that these provisions give priority to radio communications or signals relating to ships in distress and prohibits a charge for the transmission of maritime distress calls and related traffic.

(2) Licensees offering distress and safety services should coordinate with the appropriate search and rescue organizations responsible for the licensees service area.

(g) Considerations involving transfer or assignment applications.

(1) "Trafficking" in bare licenses issued pursuant to paragraph (a) of this section is prohibited, except with respect to licenses obtained through a competitive bidding procedure.

(2) The Commission will review a proposed transaction to determine if the circumstances indicate trafficking in licenses whenever applications (except those involving pro forma assignment or transfer of control) for consent to assignment of a license, or for transfer of control of a licensee, involve facilities licensed pursuant to paragraph (a) of this section. At its discretion, the Commission may require the submission of an affirmative, factual showing (supported by affidavits of a person or persons with personal knowledge thereof) to demonstrate that no trafficking has occurred.

(3) If a proposed transfer of radio facilities is incidental to a sale of other facilities or merger of interests, any showing requested under paragraph (g)(2) of this section shall include an additional exhibit which:

(i) Discloses complete details as to the sale of facilities or merger of interests;

(ii) Segregates clearly by an itemized accounting, the amount of consideration involved in the sale of facilities or merger of interests; and

(iii) Demonstrates that the amount of consideration assignable to the facilities or business interests involved represents their fair market value at the time of the transaction.

11. Section 25.201 is amended by adding new paragraphs, in alphabetical order, to read as follows:

§ 25.201 Definitions.

* * * * *

Mobile-Satellite Service. A radiocommunication service: (1) Between mobile earth stations and one or more space stations, or between space stations used by this service; or (2) Between mobile earth stations by means of one or more space stations. This service may also include feeder links necessary for its operation. (RR)

* * * * *

1.6/2.4 GHz Mobile-Satellite Service. A mobile-satellite service that operates in the 1610-1626.5 MHz and 2483.5-2500 MHz frequency bands, or in any portion thereof.

* * * * *

12. Section 25.202 is amended by adding new paragraphs (a)(4) and (a)(5) to read as follows:

§ 25.202. Frequencies, frequency tolerance and emission limitations.

* * * * *

(a) * * *

(4) The following frequencies are available for use by the 1.6/2.4 GHz Mobile-Satellite Service:

1610-1626.5 MHz:
User-to-Satellite Link
1613.8-1626.5 MHz:
Satellite-to-User Link (secondary)
2483.5-2500 MHz:
Satellite-to-User Link

(5) The following frequencies are available for use by the inter-satellite service:

22.55-23.00 GHz
23.00-23.55 GHz
24.45-24.65 GHz
24.65-24.75 GHz

13. Section 25.203 is amended by revising paragraph (c)(2)(vii) and adding new subsections (j) and (k) to read as follows:

§ 25.203 Choice of sites and frequencies.

* * * * *

(c) * * *

(2)(vii) Antenna horizon gain plot(s) determined in accordance with § 25.253(b) for satellite longitude range specified in paragraph (c)(2)(v) of this section, taking into account the provisions of § 25.253(a)(2) for earth stations operating with non-geostationary satellites.

* * * * *

(j) Applicants for non-geostationary 1.6/2.4 GHz Mobile-Satellite Service/ radiodetermination satellite service feeder links shall indicate the frequencies and spacecraft antenna gain contours towards each feeder-link earth station location and will coordinate with licensees of other fixed-satellite service and terrestrial-service systems sharing the band to determine geographic protection areas around each non-geostationary mobile-satellite service/ radiodetermination satellite service feeder link earth station.

(k) An applicant for a non-geostationary 1.6/2.4 GHz Mobile-Satellite Service space station or earth station that will operate with a geostationary satellite or non-geostationary satellite in a shared frequency band in which the non-geostationary system is (or is proposed to be) licensed for feeder links, shall demonstrate in its application that its proposed space or earth station will not cause unacceptable interference to any other satellite network that is

authorized to operate in the same frequency band, or certify that the operations of its space or earth station shall conform to established coordination agreements between the operator(s) of the space station(s) with which the earth station is to communicate and the operator(s) of any other U.S. space station licensed to use the band.

14. Section 25.208 is amended by revising paragraph (c) to read as follows:

§ 25.208 Power flux density limits.

(c) In the 17.7-19.7 GHz, 22.55-23.00 GHz, 23.00-23.55 GHz, and 24.45-24.75 GHz frequency bands, the power flux density at the Earth's surface produced by emissions from a space station for all conditions and for all methods of modulation shall not exceed the following values:

-115 dB(W/m^2) in any 1 MHz band for angles of arrival between 0 and 5 degrees above the horizontal plane.

-115 + 0.5 (d-5) dB (W/m^2) in any 1 MHz band for angles of arrival d (in degrees) between 5 and 25 degrees above the horizontal plane.

-105 dB (W/m^2) in any 1 MHz band for angles of arrival between 25 and 90 degrees above the horizontal plane.

15. A new Section 25.213 is added to read as follows:

§ 25.213 Inter-Service coordination requirements for the 1.6/2.4 GHz Mobile-Satellite Service

(a) Protection of the radio astronomy service in the 1610.6-1613.8 MHz band against interference from 1.6/2.4 GHz Mobile-Satellite Service systems.

(1) Protection zones. All 1.6/2.4 GHz Mobile-Satellite Service systems shall be capable of determining the position of the user transceivers accessing the space segment through either internal radiodetermination calculations or external sources such as LORAN-C or the Global Positioning System. During periods of radio astronomy observations, land mobile earth stations shall not operate when located within geographic protection zones defined by the radio observatory coordinates and separation distances as follows:

(i) In the band 1610.6-1613.8 MHz, within a 160 km radius of the following radio astronomy sites:

Observatory	Latitude (DMS)	Longitude (DMS)
Arecibo, PR	18 20 46	66 45 11
Green Bank Telescope, WV	38 25 59	79 50 24
	38 26 08	79 49 42
Very Large Array, NM	34 04 43	107 37 04
Owens Valley, CA	37 13 54	118 17 36
Ohio State, OH	40 15 06	83 02 54

(ii) In the band 1610.6-1613.8 MHz, within a 50 km radius of the following sites:

Observatory	Latitude (DMS)	Longitude (DMS)
Pile Town, NM	34 18 04	108 07 07
Los Alamos, NM	35 46 30	106 14 42
Kitt Peak, AZ	31 57 22	111 36 42
Ft. Davis, TX	30 38 06	103 56 39
N. Liberty, IA	41 46 17	91 34 26
Brewster, WA	48 07 53	119 40 55
Owens Valley, CA	37 13 54	118 16 34
St. Croix, VI	17 45 31	64 35 03
Mauna Kea, HI	19 48 16	155 27 29
Hancock, NH	42 56 01	71 59 12

(iii) Out-of-band emissions of a mobile earth station licensed to operate within the 1610.0-1626.5 MHz band shall be attenuated so that the power flux density it produces in the 1610.6-1613.8 MHz band at any radio astronomy site listed in subparagraphs (i) or (ii) shall not exceed the emissions of a mobile earth station operating within the 1610.6-1613.8 MHz band at the edge of the protection zone applicable for that site. As an alternative, a mobile earth station shall not operate during radio astronomy observations within the 1613.8-1615.8 MHz band within 100 km of the radio astronomy sites listed in (i) above, and within 30 km of the sites listed in (ii) above, there being no restriction on a mobile earth station operating within the 1615.8-1626.5 MHz band.

(iv) For airborne mobile earth stations operating in the 1610.0-1626.5 MHz band, the separation distance shall be the larger of the distances specified in subparagraphs (i), (ii) or (iii), as applicable, or the distance, d, as given by the formula:

d (km) = 4.1 square root of (h)

where h is the altitude of the aircraft in meters above ground level.

(v) Smaller geographic protection zones may be used in lieu of the areas specified in subparagraphs (i), (ii), (iii), and (iv) of this paragraph if agreed to by the Mobile-Satellite Service licensee and the Electromagnetic Spectrum Management Unit (ESMU), National Science Foundation, Washington, D.C. upon a showing by the Mobile-Satellite Service licensee that the operation of a mobile earth station will not cause harmful interference to a radio astronomy observatory during periods of observation.

(vi) The ESMU shall notify Mobile-Satellite Service space station licensees authorized to operate mobile earth terminals in the 1610.0-1626.5 MHz band of periods of radio astronomy observations. The mobile-satellite systems shall be capable of terminating operations within the frequency bands and protection zones specified in subparagraphs (i)-(iv), as applicable, after the first position fix of the mobile earth terminal either prior to transmission or, based upon its location within the protection zone at the time of initial transmission of the mobile earth terminal. Once the mobile-satellite system determines that a mobile earth terminal is located within an RAS protection zone, the mobile-satellite system shall immediately initiate procedures to relocate the mobile earth terminal operations to a non-RAS frequency.

(vii) A beacon-actuated protection zone may be used in lieu of fixed protection zones in the 1610.6-1613.8 MHz band if a coordination agreement is reached between a mobile-satellite system licensee and the ESMU on the specifics of beacon operations.

(viii) Additional radio astronomy sites, not located within 100 miles of the 100 most populous urbanized areas as defined by the United States Census Bureau at the time, may be afforded similar protection one year after notice to the mobile-satellite system licensees by issuance of a public notice by the Commission.

(2) Mobile-Satellite Service space stations transmitting in the 1613.8-1626.5 MHz band shall take whatever steps necessary to avoid causing harmful interference to the radio astronomy facilities listed in subparagraphs (a)(1)(i)-(ii) of this section during periods of observation.

(3) Mobile-Satellite Service space stations operating in the 2483.5-2500 MHz frequency band shall limit spurious emission levels in the 4990-5000 MHz band so as not to exceed -241 dB($W/m^2/Hz$) at the surface of the Earth.

(4) The Radioastronomy Service shall avoid scheduling radio astronomy observations during peak MSS/RDSS traffic periods to the greatest extent practicable.

(b) Protection of the radionavigation-satellite service. Mobile earth stations operating in the 1610-1626.5 MHz band shall limit out-of-band emissions in the 1574.397-1576.443 MHz band so as not to exceed an e.i.r.p. density level of -70 dB(W/MHz) averaged over any 20 ms period. The e.i.r.p. of any discrete spurious emission (i.e., bandwidth less than 600 Hz) in the 1574.397-1576.443 MHz band shall not exceed -80 dBW.

(c) Protection of aeronautical radionavigation systems. Mobile-satellite earth stations transmitting in the 1610-1626.5 MHz band shall limit e.i.r.p. levels to no greater than -15 dB (W/4kHz) on frequencies being used by systems operating in accordance with international Radio Regulation RR 732, and to no greater than -3 dB (W/4kHz) on frequencies that are not so being used. Pursuant to international RR 731E and RR 731F, respectively, all mobile-satellite Earth-to-space operations in the 1610-1626.5 MHz band and mobile-satellite space-to-Earth operations in the 1613.8-1626.5 MHz band must be coordinated and notified under the procedures set forth in Resolution 46 (WARC-92). Such mobile-satellite stations shall not cause harmful interference to, or claim protection from, stations in the aeronautical radionavigation service and stations operating pursuant to international RR 732.

(d) Fixed stations operating pursuant to international Radio Regulation RR 730. Pursuant to international Radio Regulations RR 731E and RR 731F, all mobile-satellite operations in the 1610-1626.5 MHz band (Earth-to-space transmissions) and all operations in the 1613.8-1626.5 MHz band (space-to-Earth transmissions), respectively, must be coordinated with systems operating pursuant to international RR 730 according to the coordination and notification procedures set forth in Resolution 46 (WARC-92). All such mobile-satellite stations shall not cause harmful interference to, or claim protection from, stations in the fixed service operating pursuant to international RR 730.

16. A new Section 25.278 is added to read as follows:

§ 25.278 Additional coordination obligation for non-geostationary and geostationary satellite systems in frequencies allocated to the Fixed-Satellite Service.

Licensees of non-geostationary satellite systems that use frequency bands allocated to the fixed-satellite service for their feeder link operations shall coordinate their operations with licensees of geostationary fixed-satellite service systems licensed by the Commission for operation in the same frequency bands. Licensees of geostationary fixed-satellite service systems in the frequency bands that are licensed to non-geostationary satellite systems for feeder link operations shall coordinate their operations with the licensees of such non-geostationary satellite systems.

17. A new section 25.279 is added to read as follows:

§ 25.279 Inter-satellite service.

(1) Any non-geostationary satellite communicating with other space stations may use frequencies in the inter-satellite service as indicated in § 2.106. This does not preclude the use of other frequencies for such purposes as provided for in several service definitions, e.g., FSS. The technical details of the proposed inter-satellite link shall be provided in accordance with § 25.114(c).

(2) Operating conditions. In order to ensure compatible operations with authorized users in the frequency bands to be utilized for operations in the inter-satellite service, these inter-satellite service systems must operate in accordance with the conditions specified in this section.

(a) Coordination requirements with federal government users.

(i) In frequency bands allocated for use by the inter-satellite service that are also authorized for use by agencies of the federal government, the federal use of frequencies in the inter-satellite service frequency bands is under the regulatory jurisdiction of the National Telecommunications and Information Administration (NTIA).

(ii) The Commission will use its existing procedures to reach agreement with NTIA to achieve compatible operations between federal government users under the jurisdiction of NTIA and inter-satellite service systems through frequency assignment and coordination practice established by NTIA and the Interdepartment Radio Advisory Committee (IRAC). In order to facilitate such frequency assignment and coordination, applicants shall provide the Commission with sufficient information to evaluate electromagnetic compatibility with the federal government users of the spectrum, and any additional information requested by the Commission. As part of the coordination process, applicants shall show that they will not cause interference to authorized federal government users, based upon existing system information provided by the government. The frequency assignment and coordination of the satellite system shall be completed prior to grant of construction authorization.

(b) Coordination among inter-satellite service systems. Applicants for authority to establish inter-satellite service are encouraged to coordinate their proposed frequency usage with existing permittees and licensees in the inter-satellite service whose facilities could be affected by the new proposal in terms of frequency interference or restricted system capacity. All affected applicants, permittees, and licensees, shall at the direction of the Commission, cooperate fully and make every reasonable effort to resolve technical problems and conflicts that may inhibit effective and efficient use of the radio spectrum; however, the permittee or licensee being coordinated with is not obligated to suggest changes or re-engineer an applicant's proposal in cases involving conflicts.

18. The authority citation for Part 94 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted.

19. Section 94.61 is amended by revising paragraph (b)(4) to read as follows:

§ 94.61 Applicability.

* * * * *

(b)(4) Frequencies in this band are shared with mobile and radiolocation stations in other services, and must accept harmful interference that may be experienced from operations of industrial, scientific, or medical (ISM) equipment operating on 2450 MHz. In the 2483.5-2500 MHz band, no applications for new stations or modifications to existing stations to increase the number of transmitters will be accepted. Existing licensees as of July 25, 1985, are grandfathered and their operation is co-primary with the Radiodetermination Satellite Service and Mobile-Satellite Service. However, all grandfathered temporary fixed licensees are required to notify directly each Radiodetermination Satellite Service and Mobile-Satellite Service licenses concerning present and proposed locations of operations.